In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1370

IN RE SUGAR ANTITRUST LITIGATION
MDL-201

CALIFORNIA AND HAWAIIAN SUGAR COMPANY, AMALGAMATED SUGAR COMPANY, AMERICAN CRYSTAL SUGAR COMPANY, AMSTAR CORPORATION, THE GREAT WESTERN SUGAR COMPANY, HOLLY SUGAR CORPORATION, UNION SUGAR DIVISION, CONSOLIDATED FOODS CORPORATION, U AND I INCORPORATED, and CALIFORNIA BEET GROWERS ASSOCIATION, LTD.,

Petitioners,

v.

STATE OF CALIFORNIA AND MADELYNE BRINKER,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioners,

v.

STATE OF CALIFORNIA and MADELYNE BRINKER,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in *State of California v. California and Hawaiian Sugar Co., et al.* and *Madelyne Brinker v. Amalgamated Sugar Co., et. al.,* Nos. 76-2937 and 76-3001 below.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*) and the opinion of the court of appeals denying rehearing (Appendix B, *infra*) are not yet officially reported. The first opinion appears at 1978-2 CCH Trade Cases paragraph 62,363. The opinion of the district court (Appendix C, *infra*) is reported at 1976-2 CCH Trade Cases paragraph 61,004.

JURISDICTION

The district court certified its decision for appeal under 28 U.S.C. § 1292(b), and the court of appeals had jurisdiction under that section after its acceptance of the certification. The opinion of the court of appeals was filed on November 28, 1978. The petition for rehearing was denied on January 29, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

More than 100 private class action lawsuits alleging interstate price-fixing conspiracies by the nation's major sugar refiners in violation of the Sherman Act and seeking treble damages under Section 4 of the Clayton Act are consolidated for pretrial proceedings pursuant to 28 U.S.C. § 1407 in the Northern District of California. Among these cases is one brought by California on behalf of a class of state entity purchasers and a class of household purchasers of sugar at grocery stores. Shortly after briefing and argument but before decision of the matter of class certification in the district court, respondents here, California and Madelyne Brinker, respectively, filed actions in the California Superior Court alleging the same antitrust cause of action of price-fixing in interstate commerce set forth in the complaints consolidated in federal court and seeking treble damages under California's little Sherman Act on behalf of the same class of household purchasers of sugar at grocery stores sought to be represented by California in its federal court action.

1. Are not these state court cases removable to the federal district court pursuant to 28 U.S.C. § 1441(b)?

(a) Does not a complaint alleging a price-fixing conspiracy in interstate commerce against an entire interstate industry arise under, and call for the application of, federal antitrust law, even though the plaintiff may seek a state remedy under a state little Sherman Act, and is not such a case therefore removable? Is this not especially so when the state court complaints allege the same cause of action as cases then consolidated in federal court pursuant to 28 U.S.C. § 1407 and were, according to the district court's finding, deliberately fashioned to avoid the pre-existing jurisdiction of the federal court?

(b) If the cases *prima facie* arise under federal law, does the district court's subsequent denial of a motion to certify a "consumer class" and this Court's subsequent decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), denying a treble damage remedy under Section 4 of the Clayton Act to indirect purchasers, divest the district court of federal removal jurisdiction? This is what the court of appeals held. Has not this Court repeatedly held that the existence of federal jurisdiction is a separate question from the existence of a valid recoverable claim, and did not the court of appeals err by confusing the two questions?

2. Should *Lambert Run Coal Co. v. Baltimore & Ohio R.R.*, 258 U.S. 377 (1922), be confined to its facts with the consequence that the principle that the jurisdiction of federal courts on removal is derivative from jurisdiction of the state court would not require dismissal or remand of a Sherman Act claim removed to the federal court in the circumstances presented at bar? The district court held that it should; the court of appeals found it unnecessary to decide. Should not certiorari be granted to consider this question as well?

STATUTES INVOLVED

Sherman Act of July 2, 1890, c. 647, 26 Stat, 209, as amended:

Section 1 (15 U.S.C. § 1):

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

Section 2 (15 U.S.C. § 2):

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

Clayton Act of October 15, 1914, c. 323, 28 Stat. 730, as amended:

Section 1 (15 U.S.C. § 12):

> "Antitrust laws" as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety . . . .
>
> "Commerce", as used herein, means trade or commerce among the several States and with foreign nations . . . .

Section 4 (15 U.S.C. § 15):

> Any person who shall be injured in his business or property by reasons of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

28 United States Code, Section 1407

> (a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or

> consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions . . . .
>
> (b) Such coordinated or consolidated pretiral proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation . . . .

28 United States Code, Section 1441

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 United States Code, Section 1447(c)

> If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

Cartwright Act, Calif. Bus & Prof. Code § 16750, as amended:

> (a) Any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefor in any court having jurisdiction in

the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover three times the damages sustained by him, and shall be awarded a reasonable attorneys' fee together with the costs of the suit.

Such action may be brought by any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, regardless of whether such injured person dealt directly or indirectly with the defendant.

STATEMENT OF THE CASE

A. The Parties and the Proceedings Below.

Petitioners constitute most of the major refiners and marketers of sugar in the Western United States. Their businesses are inherently interstate in character. *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 239 (1948).

Respondents are the State of California and Madelyne Brinker, a resident of California who has allegedly purchased sugar refined and marketed by certain of petitioners at grocery stores in California.

In December 1974, the United States filed civil complaints and criminal indictments charging several of the petitioners with price-fixing conspiracies in violation of Section 1 of the Sherman Act. We attach as Appendix D the indictment in *U.S. v. C and H.*[1]

Private civil suits mirroring the allegations in the Government's indictments began to be filed the very next day. In all, some 100 private class action civil cases have been filed in some 18 different district courts virtually all of which allege the identical price-fixing conspiracies described in the Government's indictments.

1. There were two indictments and three civil actions, all filed in the United States District Court for the Northern District of California, involving alleged conspiracies in different parts of the United States. The indictment in *United States v. California and Hawaiian Sugar Co., et al* ("*U.S. v. C and H*"), CR 74 829 ACW in the files of the district court, alleged a price-fixing conspiracy in the geographic area of California, Arizona and Nevada.

By order of the Judicial Panel on Multi-district Litigation filed June 4, 1975, the private actions were consolidated in the United States District Court for the Northern District of California, designated as *In re Sugar Industry Antitrust Litigation*, MDL 201, and assigned to the Honorable George H. Boldt pursuant to 28 U.S.C. § 1407. Among the cases consolidated before Judge Boldt was one filed by the State of California, on July 7, 1975, in the United States District Court for the Northern District of California. California's complaint (Appendix E) sought treble damages on behalf of a class of state entities and on behalf of a class of purchasers of sugar at grocery stores.

A number of the plaintiffs, including California, filed motions seeking certification of classes. The claims for class representation were numerous and conflicting. On the one hand, Judge Boldt was asked to certify classes of wholesalers and retail grocers and, on the other hand, was asked to certify a class consisting of consumers who purchased sugar at grocery stores. The matter of class certification was briefed and taken under submission by Judge Boldt after hearing oral argument on December 9, 1975.

Madelyne Brinker's complaint in the California Superior Court (Appendix G) was filed on or about December 16, 1975, and California filed its state court complaint (Appendix F) on February 4, 1976. California's complaint in the state court is virtually a carbon copy of its prior Sherman Act complaint in the federal court. It charges "a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce" (Appendix F, p. 43) and at a later point characterizes the conspiracy as being "in violation of Section 1 of the Sherman Act" (Appendix F, p. 44). Madelyne Brinker's state court complaint also closely follows the Government's Sherman Act indictment, charging the defendants with the same price-fixing conspiracy, and specifies that she is complaining of restraints of trade in interstate commerce. Both complaints seek remedies provided by California's Cartwright Act (Cal. Bus. & Prof. Code §§ 16,600, et seq.).

Petitioners filed petitions for removal March 18, 1976, and both California and Brinker filed timely motions to remand.

In its Opinion and Order Re Class Actions, dated May 20, 1976, the district court certified industrial and grocery classes and declined to certify consumer classes. The order of May 20, 1976, was subsequently modified and made final by order of August 16, 1976.[2]

B. The District Court's Opinion.

By his Memorandum Decision on Plaintiffs' Motion to Remand, dated July 23, 1976, Judge Boldt denied the motion to remand. In doing so, the court noted that the California Cartwright Act under which the two state court actions had been brought is in substance "identical to the Sherman Act" and that "on the face of the present record the pleadings of all plaintiffs present alleged Sherman Act violations . . . ." (Appendix C, p. 12, n.) The district court then addressed the question as to whether the doctrine of "derivative jurisdiction" as fashioned in *Lambert Run Coal Co. v. Baltimore & Ohio R.R., supra ("Lambert Run")*, would require that the Sherman Act aspects of the state court complaint be dismissed and the case remanded to state court for disposition of state law claims. Since the Ninth Circuit had previously applied the derivative jurisdiction doctrine for the purpose of remanding an antitrust case to state court (*Washington v. American League of Professional Baseball Clubs*, 460 F.2d 654 (9th Cir. 1972) (*"Baseball"*), the court discussed at length reasons that the doctrine should not be applied to the cases at bar. Noting that legal scholars have "denounced the doctrine as being contrary to sound and 'practical judicial administration'" (Appendix C, p. 14), Judge Boldt drew on his own experience to explain the importance of maintaining control of complex multi-district antitrust litigation in the federal courts (Appendix C, p. 15):

2. On November 28, 1978, the court of appeals dismissed an appeal from Judge Boldt's order denying certification of consumer classes.

> In the several years since *Baseball* was decided substantial changes occurred in the conduct of antitrust litigation. Due to the widespread application of multidistrict litigation authorized by 28 U.S.C. § 1407 and the frequent certification of class action in such litigation, remands comparable to that sought in the *California* and *Brinker* cases will have highly adverse effects upon efficiency, expediting, avoiding duplication and control of time and expense incurred in discovery and almost every other phase of conducting multidistrict litigation. [Footnote omitted.] The above statement is based on extensive personal experience in conducting multidistrict litigation beginning with the "Electrical Equipment" cases, wherein unprecedented procedures were devised to cope with many unprecedented legal problems, many of which were removed by 28 U.S.C. § 1407.

Judge Boldt went on to say that he thought it "unlikely that Congress in enacting § 1407 had any intimation that the *Lambert Run* doctrine might substantially minimize the use and effectiveness of the new type of litigation," and predicted that a remand would "stimulate a flood of litigation identical to that now at issue."[3] Noting that the *California* and *Brinker* actions "were deliberately fashioned for the calculated purpose of precluding federal jurisdiction" and that interstate antitrust litigation "has been generally considered essentially federal," the court emphasized "the critical importance of the national antitrust laws and their enforcement to our nation and its economy" and concluded that "only the United States Supreme Court or Congress should determine national policy of such magnitude" (Appendix C, p. 17).

3. Appendix C, p. 17.
The first manifestation of the correctness of this prediction is found in the files of the Minnesota District Court for the Fourth Judicial District, *State of Minnesota v. American Crystal Sugar Co., et al.*, No. 753748. Minnesota's complaint filed February 16, 1979 is virtually identical to that filed by Minnesota in federal court below and it seeks recovery on behalf of household purchasers of sugar at grocery stores with respect to the same sugar sold to the retail grocers classes with whom all of petitioners have settled in the federal court.

Judge Boldt certified his order denying remand for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) so that the "unique facts and circumstances of this particular proceeding" could "provide a means by which our Circuit Court can offer the United States Supreme Court an early opportunity to reappraise the much condemned *Lambert Run* doctrine . . . ."[4] Judge Boldt concluded his discussion with the following observation:

> "The undersigned judge is confident that neither our Circuit nor the United States Supreme Court will preclude early review by that court of the *Lambert Run* doctrine; at a minimum as applied to multi-district litigation."

C. The Opinion of the Court of Appeals.

Contrary to Judge Boldt's expectations, the opinion of the court of appeals did not reexamine *Lambert Run*. Instead, the opinion holds that the state court complaints, which concededly were born of a massive federal litigation under the Sherman Act, did not arise under federal law. This unexpected conclusion is based, first, on the hypothesis that the states are "free" to fashion and apply to the same causes of action that are the subject of multi-district federal antitrust litigation state antitrust principles that are in conflict with federal, and, second, on the notion that a complaint stating a cause of action for price-fixing under the Sherman Act does not arise under federal law if brought on behalf of a class of indirect purchasers of the kind held by this Court in *Illinois Brick* to be without a treble damage remedy under Section 4 of the Clayton Act.[5]

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4. Appendix C, p. 18. Judge Boldt referred in his opinion to an address by Chief Justice Burger on the "Causes of Popular Dissatisfaction with the Administration of Justice, which urges reappraisal of all time-honored procedures and practices, *'even if . . . presently tolerable'* in order to cope with the problems that will be encountered during the next half century. (Emphasis added.)" (Appendix C, p. 18.)

5. *Illinois Brick* was decided by this Court more than a year after the state cases were removed to federal court and several months after the briefs were filed in the court of appeals.

After stating the facts, the opinion summarizes the essence of petitioners' contentions in the court of appeals (Appendix A, p. 4): That the state complaints "state claims under federal law as well as under state law", that "the existence of a federal cause of action depends on the pleaded facts and not upon a plaintiff's decision to give those facts a federal label", that "the charging allegations of both complaints are copied from criminal indictments filed . . . by the United States", that "the commerce in which the restraints are said to occur is interstate", that California "is attempting to circumvent the denial" by the federal court of consumer class certification, and that "the district court acted properly in protecting its jurisdiction over the claims before it and over the classes certified and in avoiding the chaos that they feel would result from simultaneous prosecution of complex state and federal actions pursuing the same relief".

The opinion of the court of appeals then digresses on a tangent that was neither briefed nor argued by the parties, holding, in effect, that denial of consumer class certification by the district court and this Court's decision in *Illinois Brick*, both subsequent to removal, rendered the cases non-removable (Appendix A, pp. 4-6, emphasis ours).

> However appealing these contentions might be in other contexts, they have no merits here. Here we are squarely faced with claims asserted under California anti-trust law *on facts which do not state a federal claim.*
>
> The order of the district court denying consumer class certification in the consolidated federal litigation presaged the decision in *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977). There, in construing § 4 of the Clayton Act . . . , the Court held that with rare exception only direct purchasers could claim and recover for injury caused by price fixing. . . . Under this holding, a consumer class . . . cannot claim under the Clayton Act that overcharges had been passed on to them. . . .

> It follows from *Illinois Brick* that the consumer class action claims of these plaintiffs, if construed by us as arising under federal law, would be dismissed in federal court. While the process of removal of state actions looks to trial of the removed cause in a more appropriate forum, here removal will assure that the cause will never be tried at all. It would be incongruous for us to construe these state law consumer class claims as arising under federal law when, under federal law as announced in *Illinois Brick, it would appear that they never arose at all.*

The opinion then goes on to hold that since the plaintiffs would not be able to recover treble damages in federal court, the cases should be remanded to state court for a determination as to whether state law might not provide a treble damage antitrust remedy (Appendix A, pp. 6-7, emphasis ours):

> We make no pretense of forecasting state law in this area. We do say that however state law might be construed, *the state should be free to settle the question. To deny remand* under these extraordinary circumstances *amounts to federal preemption of the antitrust laws* by judicial act where it is conceded that there is no congressional preemption. Should such action become the general practice, *the state would be deprived of any power to legislate other than in accordance with the Clayton Act* as construed in *Illinois Brick*.[6]

The court's holding is thus necessarily based on the hypothesis that there is *no* federal preemption in the field of antitrust and that the state courts are "free" to apply to essentially interstate industries and transactions antitrust principles in conflict with federal antitrust law. This holding on federal preemption is reflected at an earlier footnote in the opinion (Appendix A, p. 5, n. 5) where the court purports to distinguish certain removal

6. Petitioners did not concede that there is *no* federal preemption in Sherman Act cases. Petitioners contended in the court of appeals and urge here that the Sherman Act is the paramount law of the land and that conflicting state laws cannot be applied to interstate transactions.

cases as "alleging claims under federal statutes which effectively pre-empted the state law."

The opinion of the court of appeals disposes in a footnote of the derivative jurisdiction question, which was the primary focus of the district court's opinion (Appendix A, pp. 4-5, n. 4). The opinion notes that the district court had distinguished *Lambert Run, supra,* and *Baseball, supra,* "on the ground that here the cases are multi-district and class action cases." The opinion of the court of appeals concludes its discussion of this point as follows (Appendix A, p. 5, n. 4 emphasis ours):

> "We need not reach the question whether the procedure followed in *Baseball* [viz, remand of the state claims to state court] should apply in multi-district class action cases where both federal and state claims are intermingled or whether the distinction drawn by the district court should apply. As we discuss, *infra,* here *there is no federal consumer class claim* to be consolidated with the other multi-district claims."

At this point the opinion of the court of appeals simply ignores the fact, acknowledged elsewhere in the opinion (Appendix A, p. 3), that California asserted a consumer class claim in the federal court and that certification of the class was denied *after* the state court actions had been removed.

By Order, filed January 29, 1979, the court of appeals denied rehearing and modified footnote 6 of its opinion by expanding its quotation from Section 16760, California Business and Professions Code, which neither adds to nor detracts from the fundamental errors of the opinion.

REASONS FOR GRANTING THE WRIT

The first question stated above calls for a granting of the writ because it involves the extent to which the federal courts are to retain their power, first, to fashion federal principles of antitrust law that apply uniformly to industries engaged in interstate com-

merce and, second, to control the course of multi-district class action antitrust litigation that has been consolidated before a federal district judge pursuant to 28 U.S.C. § 1407. The holding of the court of appeals that the federal antitrust law is not paramount in interstate price-fixing cases cannot be squared with the prior decisions of this Court. *E.g., Flood v. Kuhn,* 407 U.S. 258, 284-85 (1972). It is a question of enormous importance to the development of a uniform federal antitrust law. The reliance by the court of appeals on *Illinois Brick Co. v. Illinois, supra,* for the proposition that an antitrust cause of action cannot arise under federal law when brought on behalf of indirect purchasers reflects a fundamental misunderstanding of the holding of that case as well as a subversion of its fundamental animating principle that multiple recoveries in interstate price-fixing cases should not be permitted against a manufacturer by successive purchasers in the chain of distribution.[7] Finally, the opinion of the court of appeals erroneously departs from the well-established principle that the federal courts have jurisdiction to adjudicate controversies arising under federal law, even though the plaintiff may not have stated a valid cause of action giving rise to recovery. *Bell v. Hood,* 327 U.S. 678 (1946); *Wheeldin v. Wheeler,* 373 U.S. 647, 649 (1963); *Avco Corp. v. Aero Lodge 735,* 390 U.S. 557 (1968).

If the writ is granted as to the first question, the Court should address itself to the second question as well. The *Lambert Run* doctrine as applied in antitrust cases evolved in an earlier era when the conduct of federal antitrust litigation and the law itself were fundamentally different from what they have become today. Today the antitrust laws include not only the Sherman

7. The opinion of the court of appeals itself creates the specter of multiple recoveries against the petitioners here, who to date have paid and agreed to pay $60 million in settlement of most of the class suits certified by Judge Boldt, including a class of grocery purchasers. If the states are now free to certify consumer classes, petitioners will be subjected to double recovery with respect to the same alleged price fix on the same sugar resold to the consumer classes by the classes with whom petitioners have settled.

and Clayton Acts but also Rule 23 and 28 U.S.C. § 1407, by which Congress has created the means of conducting private treble damage antitrust suits against entire industries on behalf of whole populations and has commanded that such suits be consigned to the control of a single federal judge. It would be inappropriate to extend *Lambert Run* to defeat federal control of such cases.

I. The State Claims Arose Under Federal Law

A. THE COMPLAINTS ALLEGE INTERSTATE PRICE-FIXING IN VIOLATION OF THE SHERMAN ACT AND SPRING FROM PRE-EXISTING FEDERAL JURISDICTION

The removal statute, 28 U.S.C. § 1441(b) provides in part (emphasis ours):

> "*Any civil action of which the district courts have original jurisdiction* founded on a claim of or right arising under the Constitution treaties or laws of the United States *shall be removable* without regard to citizenship or residence of the parties."

Although only the complaint in *California* overtly refers to the Sherman Act, both the *Brinker* and *California* complaints allege a set of facts constituting a violation of the Sherman Act. The charging allegations of both complaints are copies of the criminal indictments filed against certain of the petitioners by the United States. Both complaints allege price-fixing conspiracies in interstate commerce and therefore necessarily arise under a federal statute, to wit Section 1 of the Sherman Act. Moreover, California was already a party to the federal proceedings where it was seeking to represent a consumer class, and its state complaint was a virtual copy of its federal complaint. The complaints so self-evidently arose out of federal law that the district court's opinion relegated this phase of the matter to the footnotes.[8]

8. In *Baseball, supra,* the court had assumed without deciding that the asserted claims under Washington's little Sherman Act arose under federal law.

B. RESPONDENTS' PREFERENCE FOR A STATE REMEDY DOES NOT DEFEAT FEDERAL JURISDICTION

The respondents here sought in the state court to rely exclusively on the remedies available to them under California's little Sherman Act and thereby avoid federal jurisdiction. A plaintiff may not prevent removal of a case that states a cause of action under a federal statute by seeking solely a state remedy.

The cases most clearly in point are those arising under Section 301(a) of the Labor Management Relations Act of 1947 (29 U.S.C. § 185, 61 Stat. 156-157), which confers jurisdiction on the federal courts over suits for violations of contracts between an employer and a labor union in an industry affecting commerce. In *Textile Workers v. Lincoln Mills,* 353 U.S. 448, 456 (1957), this Court held that the substantive law applicable "in suits under Section 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." While suits seeking state remedies in state court to enforce contracts cognizable under Section 301(a) may be maintained, *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502 (1962), such cases are removable to federal court because the substantive labor law that must be applied by the states is federal. *Avco Corp. v. Aero Lodge 735,* 390 U.S. 557, 560 (1968). Such cases are removable even though the plaintiff seeks a state remedy in a state court and disavows any reliance on the federal statute. *Johnson v. England,* 356 F.2d 44 (9th Cir. 1966) *cert. denied,* 384 U.S. 961 (1966).[9]

As noted above, the court of appeals distinguished the Section 301 cases on the basis of its assertion that the states are at liberty to fashion and apply to alleged interstate antitrust violations substantive state antitrust law in conflict with the federal law. We submit that this is palpable error.

9. *Cf.* American Synthetics Rubber Corp. v. Louisville & N.R. R., 422 F.2d 462 (6th Cir. 1970); Mountain Navigation Co. v. Seafarers' Int'l. U. of N.A., 348 F.Supp. 1298, 1301 (W.D. Wisc. 1971); Ulichny v. General Electric Co., 309 F.Supp. 437 (N.D.N.Y. 1970).

The intent of Congress to create a paramount federal antitrust law is if anything more clearly manifest than the need for primacy of federal law in the field of labor relations.[10] The broad terms used in Sections 1 and 2 of the Sherman Act "took their origin in the common law" and were intended "by an all embracing enumeration to make sure that no form of contract or combination by which an undue restraint of . . . commerce was brought about would save such restraint from condemnation." *Standard Oil Co. v. United States,* 221 U.S. 1, 51, 59-60 (1910). "As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. . . . Its general phrases, interpreted to attain its fundamental objects . . . . call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce . . . ." *Appalachian Coals, Inc. v. United States,* 288 U.S. 344, 359-60 (1933). This Court is thus the ultimate guardian of this nation's antitrust laws; it has repeatedly recognized that conflicting state and common law doctrines[11] must give way to the overriding policy of the Sherman Act as interpreted by this Court.

In *Sola Electric Co. v. Jefferson Co.,* 317 U.S. 173 (1942), a diversity suit to recover patent royalties, the defendant alleged in a counter-claim that patentee's licensing contract violated the Sherman Act. The district court and the court of appeals applying

10. See Note, The Federal Common Law, 82 Harv. L. Rev. 1512, 1531-35 (1969). Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) recognized the obligation of the federal courts to fashion and apply federal common law respecting rights and duties arising out of the federal Constitution and statutes when there was a need for national uniformity.

11. *Cf.* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1969), where the Court refused to permit the common law defense of *in pari delicto* in a Sherman Act case. "[W]e cannot accept the Court of Appeals' idea that courts have power to undermine the antitrust acts by denying recovery to injured parties merely because they have participated to the extent of utilizing illegal arrangements formulated and carried out by others."

state law held that the licensee was estopped to deny validity of the license. This Court reversed, holding that federal law governed the question of illegality and that conflicting state laws must give way (317 U.S. at 176-77):

> When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. . . .
>
> . . . .
>
> Local rules of estoppel which would fasten upon the public as well as the petitioner the burden of an agreement in violation of the Sherman Act must yield to the Act's declaration that such agreements are unlawful, and to the public policy of the Act. . . ."

In *Flood v. Kuhn,* 407 U.S. 258 (1972), this Court was confronted with application of state antitrust laws to an interstate business to which the Sherman Act does not apply, to wit professional baseball. The Court adopted the reasoning of the lower courts that to permit application of state antitrust laws to such transactions would conflict with the policy of the Sherman Act (407 U.S. at 284):

> The petitioner's argument as to the application of state antitrust laws deserves a word. Judge Cooper rejected the state law claims because the state antitrust regulation would conflict with federal policy and because national "uniformity [is required] in any regulation of baseball and its reserve system." 316 F.Supp., at 280. The Court of Appeals, in affirming, stated, "[A]s the burden on interstate commerce outweighs the state's interest in regulating baseball's reserve system, the Commerce Clause precludes the application here of state antitrust law." 443 F.2d, at 268. As applied to organized baseball . . . these statements adequately dispose of the state law claim.

While the Court's holding is expressly limited to baseball, its rationale more strongly calls for recognition of the paramountcy of the Sherman Act in the context of the case at Bar. Here federal jurisdiction under the Sherman Act is being exercised over the same cause of action that the court of appeals would remand for application of state antitrust laws in conflict with *Illinois Brick.*

The overriding importance of a uniform national antitrust law applicable in interstate commerce is illustrated by the facts of these cases. The petitioners, interstate refiners and marketers of sugar, are charged in federal court with a conspiracy to fix prices throughout the Western United States. Under *Illinois Brick,* the direct purchasers may recover treble the full amount of any overcharge resulting therefrom, but indirect purchasers may not recover damages for such overcharges. California has recently enacted a statute[12] authorizing recovery of treble damages by persons who dealt "indirectly with the defendant". Most of the petitioners have paid large sums to settle with the grocer classes certified by the district court on the assumption that no class of purchasers at grocery stores had been or could be certified. If California may now permit recovery by consumers,[13] the policy of the federal antitrust laws as expressed in *Illinois Brick* will be thwarted. The Court in that case was at pains to spell out its deter-

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12. On August 25, 1978, California amended § 16750 of the California Business and Professions Code to provide for recovery of treble damages by indirect purchasers in state antitrust cases and to provide that the amendment is declaratory of existing law. Ch. 536, 1978 Laws, 1978 Cal. Legis. Serv. 1667, set forth at pp. 5-6, *supra.*

13. In its opinion and order denying rehearing (Appendix B) the court of appeals sets forth a portion of Section 16760, California Business and Professions Code, which reduces damages recoverable in state *parens patriae* cases "by amounts which have been awarded for the same injury." Whether this reduction is applicable in private class action suits, whether it covers amounts paid in settlement of federal suits, or whether it would prevent *any* recovery by indirect purchasers when there has already been recovery by direct purchasers are all matters that will presumably be decided by the courts of California. And what will be the result if state court recovery by indirect purchasers precedes federal court recovery by direct purchasers? The potentialities for conflict with federal law are manifest.

mination that multiple recoveries not be countenanced under the antitrust laws (431 U.S. at 730-31, emphasis ours):

> First, allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants. Even though an indirect purchaser had already recovered for all or part of an overcharge passed on to it, the direct purchaser would still recover automatically the full amount of the overcharge . . .; similarly, following an automatic recovery of the full overcharge by the direct purchaser, the indirect purchaser could sue to recover the same amount . . . . A one-sided application of *Hanover Shoe* substantially increases the possibility of inconsistent adjudications—and therefore of unwarranted multiple liability for the defendants . . .; [*O*]*verlapping recoveries are certain to result . . . unless the indirect purchaser is unable to establish any pass-on whatsoever . . . .* [*W*]*e are unwilling to "open the door to duplicative recoveries" under* § 4.

The opinion of the court of appeals opens the door that this Court so recently closed. If 50 states are now at liberty to adopt statutes that permit recovery of treble damages by indirect purchasers in the chain of distribution from interstate manufacturers charged with price-fixing, what can be said of the authority of this Court or of Congress to fashion a coherent antitrust law? What will be the consequences for major interstate businesses that are confronted with a welter of conflicting state antitrust laws?

And could it be prudent for the nation's judiciary to be endlessly and repetitively embroiled in the same controversy in a host of state and federal forums? Chief Justice Burger has eloquently expressed the importance of flexibility to meet the increasing burdens of the administration of justice (note 4, *supra*). Indeed, recent developments in the law have augmented the federal character of major antitrust litigation by vesting in the federal district courts powers for the effective adjudication of national controversies, which themselves suggest the appropriateness of

removal of cases filed in state court in the circumstances at bar.[14] Rule 23 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1407 have combined to permit massive federal antitrust litigation, where the often conflicting claims of class members and private litigants can be addressed by a single judge who can weigh the competing interests. As noted in the opinion of the district court (Appendix C, pp. 14-17), the problems of managing such litigation are enormous. Typically, a relatively small group of plaintiffs' lawyers is designated by the court or otherwise to form a steering committee charged with the responsibility of coordinating discovery and prosecuting the cases for the plaintiffs. If any plaintiff's counsel who is dissatisfied with the makeup of the steering committee or the manner in which the court is managing the litigation should file the same case in one or more state courts, the unified control of the federal court would be defeated.[15]

Addition of the *parens patriae* remedy enacted as Title III of the Hart-Scott-Rodino Antitrust Improvement Act of 1976 (Pub. Law 94-435; 90 Stat. 1394; 15 U.S.C. § 15(c)) enhances the federal character of massive antitrust litigation by providing a federal forum for state attorneys general on behalf of consumers. In responding to the question as to whether it would be preferable for the states to enact statutes creating a right in attorneys general to sue in *parens patriae,* Senator Hart replied, in part, that "we are talking about a private right of action to secure damages in violation of a Federal Statute which consumers . . .

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14. The power of the federal courts to protect a pre-existing jurisdiction by exercise of the writ of removal has been recognized in other contexts less compelling than this. Villarreal v. Brown Express, Inc., 529 F.2d 1219 (5th Cir. 1976).

15. Illustrative of this sort of maneuver is Three J Farms, Inc. v. Alton Boxboard Co., 1979-1 Trade Cases, ¶ 62,423 (U.S.D.C., S.C. 1978). The court there denied a motion to remand an antitrust class action suit to the South Carolina state court when the "facts alleged by the present plaintiffs are almost identical to those set forth in the Unified and Consolidated Complaint" (*Id.* at p. 76,548) filed in the Southern District of Texas, which has been consolidated by order of the Judicial

have enjoyed since 1890", that "if 50 States enacted 50 different State Antitrust Statutes, corporations would really be confused and uncertain over what conduct was legal and what conduct was illegal", and that a corporate defendant "would have to litigate 50 different trials in 50 different jurisdictions under 50 different standards" (122 Cong. Rec. 8272, May 28, 1976).

C. THE COURT OF APPEALS' RELIANCE ON ILLINOIS BRICK IS MISPLACED

The conclusion of the court of appeals that the complaints do not state federal claims because under *Illinois Brick* the plaintiffs could not recover treble damages under Section 4 of the Clayton Act is an erroneous interpretation of that case as well as a misapplication of long established principles of federal removal jurisdiction.

Illinois Brick was a determination on the merits that the plaintiff indirect purchasers could not recover treble damages under Section 4 of the Clayton Act. There was no determination that the federal courts were without jurisdiction of the subject matter. The complaints in *Brinker* and *California* in the state court either stated federal claims arising under the Sherman Act or they did not; *Illinois Brick* changed the available federal remedy, but not whether the cases arose under federal law.

In *Bell v. Hood*, 327 U.S. 678 (1946) a suit was brought against federal officers for trespass in violation of the plaintiffs' alleged

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Panel on Multidistrict Litigation. In Re Corrugated Container Antitrust Litigation, 441 F.Supp. 921 (J.P.M.L. 1977). The opinion of the court observes that it is "obvious that the present plaintiffs are making a determined effort to prevent their action from being consolidated for pretrial proceeding with the other cases arising out of the same facts and allegations" and asserts that "these actions raise a serious question as to whether the desire to return to the South Carolina state court is for the benefit of the South Carolina plaintiffs or for the benefit of their attorneys." The court observed that the action of the plaintiffs' attorneys was designed to "put the defendants in an impossible position of running back and forth between the Texas and South Carolina courts producing the same documents and information in both places. This would destroy the effectiveness of the Judicial Panel on Multidistrict Litigation and for all practical purposes irradicate 28 U.S.C. 1407" (*Id.* at 76,548, 76,549.)

rights under the Fourth and Fifth Amendments. The district court dismissed for want of federal jurisdiction without ruling on the question as to whether a cause of action had been stated in the complaint. This Court reversed, stating, in part, as follows (327 U.S. at 682):

> Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

Accord: Wheeldin v. Wheeler, 373 U.S. 647, 649 (1963).

In *Avco Corp. v. Aero Lodge 735, supra,* a suit for injunction was brought in state court under a "no-strike" clause in a collective bargaining agreement. The defendant union removed the case to the federal court on the ground that it arose under Section 301 of the Labor Management Relations Act. The jurisdiction of the federal court on removal was sustained, even though it was admittedly without power to grant a federal injunction (390 U.S. at 561):

> The nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy.

The only issue before the court on a motion to remand under 28 U.S.C. § 1447(c) is whether the case is within the subject matter jurisdiction of the federal courts. *Thermtron Products Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). As stated by Professor Moore, "in applying § 1447(c), a distinction must be made be-

tween the federal court's lack of jurisdiction, in which case the court can only remand, and the plaintiff's failure to allege a claim upon which relief can be granted, in which case the federal court with jurisdiction can order dismissal of the claim." 1A Moore's Federal Practice 557-58 (2d ed.). The assertion in the opinion of the court of appeals that removal "looks to trial" of the action is only half right. Removal also may look to dismissal or summary judgment in favor of the removing defendant.[16]

Neither could the refusal of the district court to certify a consumer class several months after removal require that the state consumer claims be remanded. The district court's decision denying certification for reasons of atypicality and unmanageability self-evidently applied to California's removed state case as well. The decision disallowing consumer representation was not the end of California's case, and the fact that after denial of certification there was "no federal consumer class claim to be consolidated with the other multi-district claims" (Appendix A, p. 5) was immaterial to the court's jurisdiction. Brinker was free to seek consumer class certification in federal court, and if denied, her remedy like California's remedy is to await the end of the litigation and appeal from the denial of consumer classes. *Coopers & Lybrands v. Livsay,* 437 U.S. 463 (1978).

It is ironic that the court of appeals should rely on *Illinois Brick* to divest the federal courts of jurisdiction in circumstances that will produce a result diametrically at odds with the objectives of that decision—the prevention of multiple recoveries and the simplification of litigation. The federal courts have equitable powers to bring ancillary claims together in one forum for the benefit of the parties and to prevent waste of judicial time. *DiGiovanni v. Camden Ins. Ass'n.,* 296 U.S. 64, 70 (1935); *Mitchell v. Maurer,* 293 U.S. 237, 243 (1934); CHAFFEE, *Bills of Peace with Multiple Parties,* 45 Harv. L.Rev. 1297 (1932). This

16. Illustrative of cases from the Ninth Circuit in which dismissal of the federal claims followed removal is Watkins v. Grover, 508 F.2d 920 (9th Cir. 1974).

Court should reaffirm the power of the federal courts to protect their jurisdiction and to prevent a pestilence of litigations by exercise of the writ of removal in the circumstances at bar.

II. The Doctrine of Derivative Jurisdiction Does Not Require Remand

In *Lambert Run, supra,* this Court held that a federal case removed from a state court that did not have jurisdiction in the first instance must be dismissed, stating the rule as follows (258 U.S. at 382):

> The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction.

The same year, in *General Investment Co. v. Lake Shore Ry.,* 260 U.S. 261, 288 (1922) the Court dismissed a suit under the Sherman Act for lack of derivative removal jurisdiction.

In *Lambert Run* the plaintiffs sought in the state court to restrain the defendant railroad from complying with certain rules promulgated by the Interstate Commerce Commission allocating coal cars. Since a suit against the United States could only be brought in federal court, there was no cause of action cognizable in state court. Similarly, in *General Investment Co. v. Lake Shore Ry., supra,* Ohio had no state antitrust law, and there was therefore no antitrust remedy that could be afforded in state court.

The principles of these cases do not reach the circumstances at bar. This is so both because the state court remedies available have been expanded and because class action multi-district litigation is of a different genre from the cases there involved.

To say that the federal courts have exclusive jurisdiction to enforce the remedies afforded by the Sherman Act and Clayton

Act[17] does not mean that the states are precluded from creating an antitrust remedy. But the substantive law for which the remedy is a sanction in interstate transactions remains the federal antitrust law, not an independent body of law at odds with federal antitrust policy as declared by this Court. When a case is brought in state court seeking a remedy under California's little Sherman Act alleging price-fixing conspiracies that implicate interstate commerce,[18] the state court must apply federal substantive law under the Sherman Act.[19] Hence, a single cause of action governed by federal law exists, and the federal court has derivative jurisdiction on removal.[20]

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17. The notion that the federal courts have exclusive jurisdiction to grant the treble damage remedy afforded by the Sherman Act, Blumenstock Bros. v. Curtis Pub. Co., 252 U.S. 436, 440 (1920); Freeman v. Bee Machine Co., 319 U.S. 448, 451 (1943); Vendo Co. v. Lektro Vend Corp., 433 U.S. 623, 633 (1977); is based on a historical anachronism. At the time the Sherman Act was debated in the Senate, Congress doubted its authority to vest jurisdiction in the state courts to impose a federal penalty, to wit treble damages. 21 Cong. Rec. 311-312 (April 8, 1890). The view was nonetheless expressed by Senator Edmunds during the debate that the states would have concurrent jurisdiction under the Sherman Act to grant a state remedy of ordinary damages, even though they could not enforce the federal treble damage remedy (Id. at 317). Many years later this Court held that the states could be compelled to award a treble damage remedy afforded in a federal statute. Testa v. Katt, 330 U.S. 386 (1947).

18. The California courts have held that they may entertain jurisdiction over antitrust cases involving interstate commerce, and have heretofore applied federal law in such cases. Speegle v. Board of Fire Underwriters, 29 Cal.2d 34 (1946); R. E. Spriggs Co. v. Adolph Coors Co., 37 Cal.App. 653 (1974).

19. The obligation of the state courts to apply the Sherman Act has been previously recognized by this Court. Bement v. National Harrow Co., 186 U.S. 70, 83 (1902). *Compare* Harold Butler Enterprises, Inc. v. Vanlandingham, 505 P.2d 1149 (Ore. 1973).

20. Under the modern view a single cause of action arises from a common nucleus of operative facts giving rise to the invasion of a primary right of the plaintiff. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). Applying this principle, a number of cases have held there is but a single cause of action under state and federal antitrust laws arising from the same nucleus of operative facts. Fowler Mfg. Co. v. Gorlick,

The doctrine of derivative jurisdiction evolved in a different era long before multi-district class action antitrust litigation. Application of that doctrine to defeat a unified federal control over such litigation in circumstances where federal jurisdiction is preexisting at the time the state court action is brought would constitute an extension of the *Lambert Run* doctrine. This Court refused to extend *Lambert Run* when it was invoked to prevent an amendment to add a Sherman Act claim to a case removed from state court on grounds of diversity of citizenship. *Freeman v. Bee Machinery Co., supra.* This Court should decline to extend the derivative jurisdiction doctrine to the case at bar.

CONCLUSION

We respectfully pray that the petition be granted.

JOHN E. SPARKS
On behalf of the attorneys and petitioners above named

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415 F.2d 1248, 1254 (9th Cir. 1969), cert. denied, 396 U.S. 1012 (1970); Belliston v. Texaco, Inc. 521 P.2d 379 (Utah 1974); Ford Motor Co. v. Superior Court, 35 Cal.App.3d 676 (1973).

Appendix A

In the United States Court of Appeals
for the Ninth Circuit

Filed—Nov 28 1978

EMIL E. MELFI, JR. Clerk
U.S. Court of Appeals

In Re: Sugar Antitrust Litigation MDL 201

The State of California, etc., Plaintiffs-Appellants, vs. California and Hawaiian Sugar Co., et al., Defendants-Appellees.	No. 76-2937
Madelyne Brinker, on her own behalf and that of all others similarly situated, Plaintiff-Appellant, vs. Amalgamated Suger Co., et al., Defendants-Appellees.	No. 76-3001

OPINION

On Appeal from the United States District Court for the Northern District of California

Before: MERRILL and SNEED, Circuit Judges, and LINDBERG,* District Judge

MERRILL, Circuit Judge:

These two actions were commenced in the superior court for San Francisco, California, and were removed by the defendants

*Honorable William J. Lindberg, Senior United States District Judge for the Western District of Washington, sitting by designation.

(here appellees) to the United States District Court for the Northern District of California. There they joined a massive multi-district treble damage antitrust litigation involving several hundred plaintiffs and fourteen defendants in about a hundred consolidated cases. Appellees removed the state court actions pursuant to 28 U.S.C. § 1446 with jurisdiction for removal asserted under 28 U.S.C. § 1441(b).[1] Plaintiffs (here appellants) promptly moved for orders remanding the actions to the California courts, contending that removal jurisdiction did not exist. The district court denied the motions; the issue of jurisdiction was certified for appeal under 28 U.S.C. § 1292(b) and leave to appeal the interlocutory orders was granted by this court. The principal question presented is whether, under § 1441(b), the California actions were "founded on a claim or right arising under the * * * laws of the United States." We here hold that they were not.

The state court complaints in both actions charge that the appellees engaged in a combination and conspiracy to restrain trade by fixing and raising the price of refined sugar and fixing prepaid freight applications. Both complaints specify that the restraints were in violation of § 16720 of the California Business and Professions Code, commonly known as the California Cartwright Act, and that a right of action is conferred by § 16750 of that code.[2] Pursuant to California Code of Civil Procedure § 382

1. 28 U.S.C. § 1441(b) reads as follows:
"Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties."

2. California Business and Professions Code § 16750 reads as follows:
"(a) Any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefor in any court having jurisdiction in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover three times the damages sustained by him, and shall be awarded a reasonable attorneys' fee together with the costs of the suit."

both appellants sought to represent a class of persons similarly situated. Brinker defined the class as follows:

> "The Class consists of all private individuals who, during the relevant time period, have purchased refined sugar at retail in its original bulk-package forms within the State of California through retail outlets that sell refined sugar supplied by one or more of the Defendants in its original bulk-package form for consumption off the premises * * *."

The state, in seeking representation, defined the class as follows:

> "* * * California citizens and residents who have purchased refined sugar at retail for use or consumption during the period of the alleged conspiracy."

Prior to filing its state court action, California had filed an action in the United States District Court for the Northern District of California asserting claims under the Sherman and Clayton Acts based upon alleged price fixing of sugar. That action was consolidated with the others before the district court below. In that action the state sought to represent the members of two classes: a public entity class and a consumer class. The district court in due course acted on the many applications for class certification presented by the consolidated cases. It declined to certify a consumer class and California's prayer in this respect was denied. While this federal action was commenced by California prior to its state court action, the latter was commenced before the district court's refusal to certify a consumer class.[3]

3. A brief chronology of the events above mentioned might be helpful.
July 7, 1975. California's federal action was commenced.
December 16, 1975. Brinker's state action was commenced.
February 4, 1976. California's state action was commenced.
March 18, 1976. Removal petitions were filed in the state actions.
March 26 and 31, 1976. Motions to remand the state actions were filed in federal court.
May 20, 1976. The court order denying consumer class certification was entered.
July 23, 1976. The court order denying remand, from which these appeals are taken, was entered.

Appellants both contend that their claims alleging that state law was violated to their injury arise under state law and not under federal law.

Appellees contend that the facts alleged in the state court complaints state claims under federal law as well as under state law and thus can be said to arise under federal law. They assert that a cause of action depends upon the facts alleged and not upon the legal labels attached to the facts; that the existence of a federal cause of action depends upon the pleaded facts and not upon a plaintiff's decision to give those facts a federal label. They emphasize that the charging allegations of both complaints are copied from criminal indictments filed against certain of the appellees by the United States, and that the commerce in which the restraints are alleged to have occurred is interstate. They suggest that there is something improper in California's seeking state court relief; that it is attempting to circumvent the district court's denial of consumer class certification. They assert that the district court acted properly in protecting its jurisdiction over the claims before it and over the classes certified and in avoiding the chaos that they feel would result from simultaneous prosecution of complex state and federal actions pursuing the same relief.

However appealing these contentions might be in other contexts,[4] they have no merit here. Here we are squarely faced with

4. Even accepting these contentions, a serious problem is posed by *State of Washington v. American League of Professional Baseball Clubs,* 460 F.2d 654 (9th Cir. 1972) (*Baseball*). There the same contentions were made as are made here—that the antitrust claims alleged arose under federal as well as under state law. This court pointed out that the jurisdiction of a federal court on removal is derivative; that under *Lambert Run Coal Co. v. B. & O. R.R. Co.,* 258 U.S. 377 (1922), if the state court lacks jurisdiction over the subject-matter of an action (for example, when a federal statute grants exclusive jurisdiction to the federal courts, as do the federal antitrust statutes), that lack is not cured by removal. The removed action must be dismissed by the federal court since it has acquired no jurisdiction from the state court. In *Baseball* we concluded that under *Lambert Run* the federal court was without jurisdiction to proceed on the federal antitrust claims but that the state claims remained for disposition. We directed that the case be remanded to the state court.

In our case the district court, in its opinion denying remand to the state courts, dealt at length with *Lambert Run* and *Baseball,* and distinguished them on the ground that here the cases are multidistrict and class action cases. It concluded that to apply *Lambert Run* and *Baseball* in multidistrict class actions would be to defeat the purpose of Congress in enacting 28 U.S.C. § 1407 dealing with the consolidation of pretrial proceedings in multidistrict actions. It stated:

> "Due to the widespread application of multidistrict litigation authorized by 28 U.S.C. § 1407 and the frequent certification of class action in such litigation, remands comparable to that sought in the *California* and *Brinker* cases will have highly adverse effects upon efficiency, expediting, avoiding duplication and control of time and expense incurred in discovery and almost every other phase of conducting multidistrict litigation."

We need not reach the question whether the procedure followed in *Baseball* should apply in multidistrict class action cases where both federal and state claims are intermingled or whether the distinction drawn by the district court should apply. As we discuss, *infra,* here there is no federal consumer class claim to be consolidated with the other multidistrict claims.

claims asserted under California antitrust law on facts which do not state a federal claim.[5]

The order of the district court denying consumer class certification in the consolidated federal litigation presaged the decision in *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977). There, in construing § 4 of the Clayton Act, 15 U.S.C. § 15, the Court held that with rare exception only direct purchasers could claim and recover for injury caused by price fixing and that the recovery should include the whole of the injury caused by overcharging, whether that injury was shared by indirect purchasers or not. Under this holding, a consumer class (not composed of direct

5. Appellees would have us "transform" the claims under the California statute into one stating a federal claim. They cite as authority for this transformation a series of removal cases in which complaints purporting to state claims under state law were found to state facts actually alleging claims under federal statutes which effectively pre-empted the state law. *See, e.g., Johnson v. England,* 356 F.2d 44 (9th Cir.), *cert. denied,* 384 U.S. 961 (1966); *American Synthetic Rubber Corp. v. Louisville & N. R. Co.,* 422 F.2d 462 (6th Cir. 1970). That is not the situation facing us.

purchasers) cannot claim under the Clayton Act that overcharges had been passed on to them by those selling to them.

It follows from *Illinois Brick* that the consumer class action claims of these plaintiffs, if construed by us as arising under federal law, would be dismissed in federal court. While the process of removal of state actions looks to trial of the removed cause in a more appropriate forum, here removal will assure that the cause will never be tried at all. It would be incongruous for us to construe these state law consumer class claims as arising under federal law when, under federal law as announced in *Illinois Brick,* it would appear that they never arose at all. On the other hand, under California state law they may not be foreclosed.[6]

We make no pretense of forecasting state law in this area. We do say that however state law might be construed, the state should be free to settle the question. To deny remand under these extraordinary circumstances amounts to federal pre-emption of the

6. While the Supreme Court's construction of § 4 of the Clayton Act undoubtedly will be given great deference by state courts in their construction of the state law counterpart (Cal. Bus. & Prof. Code § 16750, *supra* n. 2), still it cannot be said with assurance that state policy would not be held to call for a different construction. The state has recently enacted California Business and Professions Code § 16760, which provides in part:

> "The Attorney General may bring a civil action in the name of the people of the State of California, as parens patriae on behalf of natural persons residing in the state * * *."

Here the state has given indication of greater concern for small claims than is afforded by class action provisions standing alone. It has indicated a desire that such claimants should not have to rely on private representation; that the state as parens patriae should attend to their needs. It is not wholly irrational to suppose that the state had in mind the claims of ultimate consumers and that it would not approve of wiping out all such claims against the price fixer in favor of the claims of direct purchasers.

The Hart-Scott-Rodino Antitrust Improvement Act of 1976, 15 U.S.C. § 15c, *et seq.*, has made the same provision for parens patriae representation. As Mr. Justice Brennan notes in his dissent in *Illinois Brick,* "The Senate Report accompanying the new Act expressly found that '[t]he economic burden of most antitrust violations is borne by the consumer in the form of higher prices for goods and services.' S.Rep., No. 94-803 * * *." 431 U.S. at 756.

antitrust laws by judicial act where it is conceded that there is no congressional pre-emption. Should such action become the general practice the state would be deprived of any power to legislate other than in accordance with the Clayton Act as construed in *Illinois Brick.*

It may well be true that to have complex state and federal actions proceeding simultaneously against the same parties will pose grave problems in the management of litigation. Appellees urge as another ground for removal that we regard removal here as in the nature of a bill of peace, designed simply to put together in one forum all claims based upon the same cause of action, thus avoiding the harassment that otherwise they feel will surely result.[7]

But, as we have noted, that is not what will happen here. State and federal courts will not be adjudicating identical claims, since these plaintiffs, as consumers or representatives of consumers, have no federal claims whatsoever under *Illinois Brick.* They seek to advance their claims in a jurisdiction where they may yet receive recognition.

We conclude that the claims of appellants in their complaints filed in the superior court for San Francisco, California, arise under state law and do not arise under federal law; and that the district court has no jurisdiction to entertain removal of the actions from state court.

The order denying remand is vacated. The cases are remanded to the district court with instructions that the motions of appellants for orders remanding the actions to state court be granted.

7. Even were we to favor the bill of peace analogy we doubt that removal would be an appropriate vehicle. Removal, as we have noted, contemplates federal trial. Where the purpose is not to bring the challenged action to trial but to stay it, in order to eliminate complicating and overlapping litigation, a forthright motion to enjoin state action would focus on the true problem more accurately and would more directly present the values that are competing for accommodation.

Appendix B

FILED JAN 29 1979

Emile E. Melfi, Jr. Clerk
U.S. Court of Appeals

In the United States Court of Appeals
for the Ninth Circuit

In Re: Sugar Antitrust Litigation State of California, Madelyne Brinker, et al., Plaintiffs-Appellants, vs. California and Hawaiian Sugar Co., et al., Defendants-Appellees.	No. 76-2937 No. 76-3001

ORDER

Before: Merrill and Sneed, Circuit Judges, and Lindberg, District Judge

The panel as constituted in the above case has voted to modify the opinion heretofore filed in the respect hereinafter set forth. With such modification, the panel has voted to deny the petition for rehearing. Judge Sneed has voted to deny the suggestion for rehearing en banc, and Judges Merrill and Lindberg have recommended such rejection.

The full court has been advised of the suggestion for en banc rehearing and of the vote and recommendation of the panel, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The opinion heretofore filed herein is modified in the following respect:

"The quotation from § 16760, California Business & Professions Code, set forth in footnote 6 of the opinion on file herein, is expanded to read as follows:

> 'The Attorney General may bring a civil action in the name of the people of the State of California, as parens patriae on behalf of natural persons residing in the state, in the superior court of any county which has jurisdiction of a defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of this chapter. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury or (B) which is properly allocable to * * * (ii) any business entity.' "

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

Appendix C

United States District Court
Northern District of California

Master File No. MDL-201

In Re: Sugar Antitrust Litigation
This Document Relates To:

State of California, on behalf of itself and its citizens and residents similarly situated, and as *parens patriae*, Plaintiff, vs. California & Hawaiian Sugar Company et al., Defendants.	C-76-561 GHB
Madelyn Brinker, on her own behalf and that of all others similarly situated, Plaintiff, vs. Amalgamated Sugar Company, et al., Defendants.	C-76-562 GHB

ORDER RE: MEMORANDUM DECISION ON PLAINTIFFS' MOTION TO REMAND

STATEMENT OF THE CASE

The multidistrict litigation of which the above two cases in question are a part, is a massive litigation involving several hundred plaintiffs in about one hundred separate cases, and fourteen defendants, ten of which are named as defendants in either one or the other or both of the above cases. The pleadings raise a considerable number of complex issues and problems. Plaintiffs are represented by 78 large firms and defendants by 27 large firms

and on both sides two or more firm members have been assigned to this litigation. All of the cases have been assigned to the undersigned judge for the conduct of all phases of pretrial procedure, including a Final Pretrial Order. A considerable number of the cases in the litigation have been assigned to this Transferee Judge for all purposes. Thus, some or all of the cases might be tried by this judge. On May 24, 1976, the court entered an Order Certifying a Class Action applicable to all cases in the litigation.

The two cases involved in the remand motion to be determined in this order are:

> *The State of California, on behalf of itself and its citizens and residents similarly situated, and as parens patriae,* (hereinafter *California*)
>
> v.
>
> *California & Hawaiian Sugar Company; Holly Sugar Corporation; Consolidated Foods Corporation; American Crystal Sugar Company; Sprekels* [sic] *Sugar Company, a division of Amstar Corporation; and California Beet Growers Association, Ltd.* and
>
> *Madelyn* [sic] *Brinker,* on behalf of herself and all those *similarly situated,* (hereinafter *Brinker*)
>
> v.
>
> *Amalgamated Sugar Company; American Crystal Sugar Company; California & Hawaiian Sugar Company; Great Western Sugar Company; Holly Sugar Corporation; National Sugar Beet Growers Federation; Amstar Corporation; and Utah Idaho Sugar Company.*

California filed a complaint in the California Superior Court for San Francisco County alleging three causes of action, each based on California antitrust laws, California Business and Professions Code §§ 16720, 16750, 19754 and 16754.5. *California* also filed a separate but substantially identical complaint in the Northern District of California based on alleged violations of the Sherman Act, which action is pending in this court, (multidistrict litigation

MDL-201; C 75 1401) against all of the same defendants. Transfer of that case to the state court is not sought by *California.* Both state court actions have been removed to this court by defendants pursuant to 28 U.S.C. § 1446. Defendants contend that this court has removal jurisdiction under 28 U.S.C. §§ 1441(b) and (c).

The *Brinker* action alleges one cause of action, based on the California antitrust laws, specifically California Business and Professions Code §§ 16600 through 17096 (Cartwright Act).[1] Defendants have removed the *Brinker* case to this court pursuant to 28 U.S.C. § 1441(c).

Plaintiffs contend that in their state court cases their alleged causes of action are based solely on state law and that neither complete diversity of citizenship nor the requisite judisdictional amount exist.[2] Alternatively, plaintiffs contend that, if in fact a federal Sherman Act antitrust claim is asserted in their state court cases, the state court would have been without jurisdiction to hear the case, and on removal the federal court would lack jurisdiction to retain the case. Defendants assert these contentions are without merit.

The sole basic issue presented is identical in both cases; i.e., whether in the particular facts and circumstances of the Sugar Litigation, remand of these two cases to the state court is mandatory. If so, plaintiffs' motion must be granted, and if not, the motion should be denied.

DISCUSSION

An order granting remand is not appealable.[3] Therefore, if remand is granted, none of the ten defendants in the *Brinker* and

1. In substance, identical to the Sherman Act.

2. On the face of the present record the pleadings of all plaintiffs present alleged Sherman Act violations the nature of which, if established, would necessarily support single damage recoveries, each far in excess of the amount required for diversity jurisdiction.

3. 28 U.S.C. § 1447(d) (1970).

California state cases will ever have an opportunity to seek review by either the Ninth Circuit Court of Appeals or by the Supreme Court of the United States. Courts have long held that the district courts should be cautious in granting remand so as not to deprive a defendant of his right to adjudicate in a federal court.[4] This admonition, in a matter of national importance, appears to be equally applicable to appellate courts.

This court is well aware that a district judge should follow decisions of the circuit court in which the judge sits, unless they can be distinguished either in facts or law and is also aware that decisions by a panel of that circuit should be followed as though they were *en banc* decisions. These propositions are emphasized because a decision of a 3-judge panel of the Ninth Circuit, at first glance, appears to preclude denial of remand in the *California* and *Brinker* cases. That case, *State of Washington v. American League of Professional Baseball Clubs,* 460 F.2d 654 (9th Cir. 1972), (hereafter *Baseball*) involved both an alleged antitrust violation and a remand to a state court.

However, the *California* and *Brinker* cases can be distinguished from the *Baseball* case because the cases involved in this proceeding are both multidistrict and class actions. The significance of these distinctions will be discussed later herein.

The basic problem in both the *Baseball* case and the instant cases concerns removal jurisdiction and in particular "derivative jurisdiction." *Baseball* includes an extremely detailed and thorough review of the doctrine of "derivative jurisdiction," which has its judicial base in the decision in *Lambert Run Coal Company v. Baltimore and Ohio Railroad Company,* 258 U.S. 377 (1922). In that case Justice Brandeis stated:

> "The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks

4. *Boatman's Bank of St. Louis, Mo. v. Fritzlen,* 135 F. 650 (8th Cir. 1905) at 653-655; *cert. den.* 198 U.S. 586 (1905); *Vann v. Jackson,* 165 F.Supp. 377 (D.N.C. 1958).

jurisdiction of the subject matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction." *Id.* at 382.

This doctrine has been vigorously and repeatedly criticized for several decades. Noted legal scholars have denounced the doctrine as being contrary to sound and "practical judicial administration,"[5] courts have criticized the harsh and illogical results produced by the doctrine,[6] and the American Law Institute has proposed the abolition of the doctrine.[7]

The Ninth Circuit Panel that rendered the decision in *Baseball* obviously was very much troubled by the *Lambert Run* doctrine. The exhaustive research recorded in their opinion suggests that Judge Duniway, author of the opinion, and his colleagues on the Panel made diligent search for a judicial basis on which to dis-

5. J. Moore, COMMENTARY ON THE U.S. JUDICIAL CODE, 219, n. 6 (1949): "Practical judicial administration can look with little favor upon this technical and subtle doctrine"; 1A J. Moore, FEDERAL PRACTICE, ¶ 157[3] (2d ed. 1974) at 46-7:

"With some logic, but indefensibly from the standpoint of practical judicial administration, the principle of derivative jurisdiction, as it pertains to subject-matter jurisdiction of the state court, has been applied so that any action, commenced in a state court, involving a matter over which the federal courts have exclusive jurisdiction, is subject to dismissal, after removal, for want of jurisdiction even though the federal court would have jurisdiction of a similar case brought originally therein:"

C. Wright, THE LAW OF FEDERAL COURTS (2d ed. 1970) at 132: "[t]he doctrine may be justifiable conceptually, but the results to which it leads are often absurd"; H. Hart and H. Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (2d ed. 1973) at 1200: citing J. Moore, COMMENTARY ON THE U.S. JUDICIAL CODE, 219 n. 6 (1949), the authors question the validity of the doctrine.

6. *Leesona Corp. v. Concordia Mfg. Co.*, 312 F. Supp. 392 (D.R.I. 1970) at 396 (citing Professor Moore and the A.L.I. Proposed Drafts, [see footnote 7] but following the existing law as stated in the *Lambert Run* case); *Cunningham v. Bethlehem Steel Co.*, 231 F. Supp. 934 (S.D.N.Y. 1964) at 937 (citing Professor Moore in a criticism of the doctrine of derivative jurisdiction).

7. American Law Institute STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS §§ 1312(d), 1317(b) (1969 Draft).

tinguish *Baseball* from the thrust of *Lambert Run* but finally concluded with obvious misgivings, that "whatever we think of it, the rule has been applied by the Supreme Court to antitrust cases." See *Baseball* at 659.

In the several years since *Baseball* was decided, substantial changes have occurred in the conduct of antitrust litigation. Due to the widespread application of multidistrict litigation authorized by 28 U.S.C. § 1407 and the frequent certification of class action in such litigation, remands comparable to that sought in the *California* and *Brinker* cases will have highly adverse effects upon efficiency, expediting, avoiding duplication and control of time and expense incurred in discovery and almost every other phase of conducting multidistrict litigation.[8] The above statement is based on extensive personal experience in conducting multidistrict litigation beginning with the "Electrical Equipment" cases, wherein unprecedented procedures were devised to cope with many unprecedented legal problems, many of which were removed by 28 U.S.C. § 1407.

In denying remand in a practically identical situation to that presented in this proceeding, Judge Inzer B. Wyatt, S.D.N.Y., briefly stated the major problems in conducting multidistrict litigation if identical state litigation was in the course of adjudication at the same time:

8. *In re: Plumbing Fixture Cases*, 298 F. Supp. 484 (1968) at 498 contains an appendix briefly summarizing the development and enactment of 28 U.S.C. § 1407.

In the seven years from enactment of 28 U.S.C. § 1407 in 1968 to June 30, 1975, over 3,900 civil actions involving innumerable litigants have been processed in multidistrict litigation by order of the Judicial Panel on Multidistrict Litigation. Of those cases over 2,500 have been remanded for trial or terminated in transferee courts. As of June 30, 1975, approximately 1,400 cases were being processed simultaneously in multidistrict litigation.

In the opinion of this judge, the number of such litigations will continue to increase indefinitely in the foreseeable future, unless the Supreme Court or Congress determines that identical state and federal antitrust litigations may be conducted simultaneously.

"Under the circumstances of this litigation, there is every reason to retain jurisdiction over the claims of all plaintiffs in this action. This is one of some one hundred and fifty antibiotic drug antitrust actions begun here or transferred here by the Panel under 28 U.S.C. § 1407. Some twenty-eight of these are brought by private hospital or Blue Cross plaintiffs. One of the actions, already referred to, is brought by these same plaintiffs, represented by the same counsel, and is based on the same factual situation as in the case at bar and in all the other cases before the Court. It would be burdensome and wasteful, both for the parties and for the judicial system, were pretrial proceedings to be conducted in this Court in the same one hundred and fifty actions and at the same time be conducted in the state court in Florida in one action. The same reasons which caused the Panel to transfer this action to this Court would dictate the exercise of discretion to retain jurisdiction over all three plaintiffs in this action." *Lee's Prescription Shops, Inc. v. Chas. Pfizer Co., Inc.*, CCH Trade Reg. Rep. ¶73,180 (S.D.N.Y. 1970) at p. 88, 660).

Grossly unsound judicial administration is inexcusable in a time when all courts, particularly federal courts and judges, are overwhelmed to near exhaustion by massive calendars and mandated speed-up provisions which, in many instances, are impossible to achieve without causing grievous injustice to other litigants whose rights of whatever magnitude must thereby be long delayed in judicial determination.

It is clear beyond doubt that Congress, in enacting 28 U.S.C. § 1407, intended to create a new and unique category of litigation for federal courts, with the purpose of vesting district courts with authority, in trial preparation and trial of multiple cases substantially identical or closely similar and filed in various district courts throughout the nation, to avoid most, if not all, of the duplicative and often contradictory practices and procedures established by ill-advised legislative enactments or by overage judicial decisions now clearly and unmistakably unsound judicial administration.

It is unlikely that Congress in enacting § 1407 had any intimation that the *Lambert Run* doctrine might substantially minimize the use and effectiveness of the new type of litigation in pursuing the functions which Congress intended it to perform. The jurisdiction of all federal courts in exclusively vested in Congress and by that body may be granted, extended, modified or abolished. In these circumstances, before the remand sought by *California* and *Brinker* can stimulate a flood of litigation identical to that now in issue, it appears reasonable and desirable that the proposed remand be reviewed by the Ninth Circuit, through a Panel or en banc, and finally by the United States Supreme Court.

In urging that procedure, perhaps it would be helpful to a reviewing court to know that both the *California* state action and *Brinker* were deliberately fashioned for the calculated purpose of precluding federal jurisdiction of their actions. Antitrust litigation was established by Congress to be enforced by federal courts and ever since has been generally considered essentially federal litigation. The enactment of state litigation identical or comparable to the Sherman Act and other related federal Acts has been of relatively recent origin. Undoubtedly, if the *California* state action and *Brinker* ultimately be remanded, similar state enactments will rapidly and widely proliferate throughout the nation. Whether as a matter of national policy that be good or bad for either state or federal courts or litigants therein, certainly it should not be determined by indirect means and the contrivance of two resourceful litigants. Congress and the United States Supreme Court have repeatedly emphasized the critical importance of the national antitrust laws and their enforcement to our nation and its economy. Only the United States Supreme Court or Congress should determine national policy of such magnitude.

Fortunately, the unique facts and circumstances of this particular proceeding provide a means by which our Circuit Court can offer the United States Supreme Court an early opportunity to reappraise the much condemned *Lambert Run* doctrine promulgated 54 years ago in an extraordinary case in which the sole basic issue was what remedy, if any, should be imposed for deliberate concealment of facts pertaining to jurisdiction. Neither the case nor the decision had even remote relationship to the national antitrust laws, let alone to multidistrict litigation created only eight years ago. Moreover, during the last half century great changes have occurred in our economy and also innumerable important advances and improvements in sound judicial administration have been inspired or ordained by the United States Supreme Court.

On April 7, 1976, Chief Justice Burger delivered his Keynote Address to the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, portions of which were published in the April issue of *The Third Branch*. The full text is available from the Federal Judicial Center Information Services and should be read and studied by everyone in the legal profession who is concerned with improvement in the administration of justice in this country. The message urges reappraisal of all time-honored procedures and practices, *"even if . . . presently tolerable,"* in order to cope with the problems that will be encountered during the next half century. (Emphasis added).

The undersigned judge is confident that neither our Circuit nor the United States Supreme Court will preclude early review by that court of the *Lambert Run* doctrine; at a minimum as applied to multidistrict litigation.

For the reasons above stated, the court finds and holds that the motions of plaintiffs in *Brinker* and *California* for remand of their state cases to the California Superior Court in and for San Francisco County, should be and hereby is denied.

In the opinion of this court, this order involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from the order may materially advance the disposition of an impotrant issue in this litigation. Accordingly, the request for an order certifying for interlocutory appeal under 28 U.S.C. § 1292(b) is hereby granted.

IT IS HEREBY SO ORDERED this 23rd day of July, 1976.

GEORGE H. BOLDT, SR. U.S. DISTRICT JUDGE

WD WASH—Sitting by Designation

Appendix D

Robert J. Staal
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FILED: DEC. 19 1974

United States District Court
Northern District of California

Criminal No. CR 74 829 ACW

United States of America,

v.

California and Hawaiian Sugar Company;
Holly Sugar Corporation; and
Consolidated Foods Corporation,
Defendants.

INDICTMENT
15 U.S.C. § 1
(Sherman Antitrust Act)
Filed:

The Grand Jury charges:

I

DEFINITIONS

1. As used herein:

(a) "Refined sugar" means any grade or type of saccharine product derived from sugar beets or sugar cane which contains sucrose, dextrose or levulose;

(b) "Refiner" means any company engaged in the processing of sugar beets or the refining of raw cane sugar into, and the sale of, refined sugar;

(c) "Basis price" means the list price of refined sugar sold by a refiner f.o.b. its refinery or processing factory;

(d) "Prepaid freight application," commonly known as a "prepay," means a portion of the delivered price for refined sugar equal in amount to a freight charge from a basing point to the customer's location;

(e) "Delivered price" means the price of refined sugar delivered to the customer and generally consists of the basis price plus the prepaid freight application;

(f) "Allowance" means a discount from delivered price;

(g) "Effective selling price" means the price actually charged to the customer by the refiner and generally consists of the delivered price, less any allowance; and

(h) "The Market" means the States of California and Arizona and the Cities of Las Vegas and Reno, Nevada. These states and cities have customarily been described by refiners as the California-Arizona territory.

II

DEFENDANTS

2. Each of the corporations named below is hereby indicted and made a defendant herein. Each is organized and exists under the laws of the state, and has its principal place of business in the city indicated below:

Name of Corporation	State of Incorporation	Principal Place of Business
California and Hawaiian Sugar Company	California	San Francisco, California
Holly Sugar Corporation	New York	Colorado Springs, Colorado
Consolidated Foods Corporation	Maryland	Chicago, Illinois

3. During all or part of the period covered by this indictment, each of the defendant corporations was engaged in the business of processing and selling refined sugar in The Market.

III

CO-CONSPIRATORS

4. Various corporations, firms and individuals not named as defendants in this indictment participated as co-conspirators in the offense charged and performed acts and made statements in furtherance thereof.

IV

TRADE AND COMMERCE

5. Refined sugar is made by processing sugar beets or by refining raw sugar which is derived from crushed sugar cane. Grocery sugar is sold to grocery wholesalers and retailers for eventual sale to consumers; industrial sugar is sold in liquid or dry form in bags or bulk to firms engaged in the preparation and manufacture of food and beverages. Approximately 22 percent of the sugar sold in the United States is sold as grocery sugar; nearly all of the remainder is sold as industrial sugar.

6. Total domestic sales of refined sugar in 1972 amounted to approximately 212 million hundredweights which had a value of about $2.5 billion. Of this, in excess of 23 million hundredweights or approximately $268 million worth of refined sugar was sold in The Market. Defendants accounted for over 69 percent of refined sugar sales in The Market.

7. During the period of time covered by this indictement, the defendant California and Hawaiian Sugar Company received substantial quantities of raw sugar derived from sugar cane grown and crushed in the State of Hawaii. There was a substantial and continuous flow in interstate commerce of said raw sugar from

the State of Hawaii to the State of California where it was refined by defendant California and Hawaiian Sugar Company and sold in The Market.

8. During the period of time covered by this indictment, substantial quantities of refined sugar, refined or processed in the State of California, was sold and shipped by defendant and co-conspirator corporations to customers located in the State of Arizona and in the Cities of Las Vegas and Reno, Nevada. There was a substantial and continuous flow of refined sugar in interstate commerce from the cane refinery and the sugar beet processing factories of defendants and co-conspirators in the State of California to customers located in the State of Arizona and in the Cities of Las Vegas and Reno, Nevada.

V

OFFENSE CHARGED

9. Beginning sometime prior to 1970, the exact date being to the Grand Jurors unknown, and continuing thereafter at least through 1972, the defendants and co-conspirators engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in The Market in violation of Section 1 of the Sherman Act as amended (15 U.S.C. § 1).

10. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were, among others:

(a) to fix and raise the basis prices of refined sugar;
(b) to fix prepaid freight applications;
(c) to eliminate, reduce and prevent giving of allowances to customers for refined sugar; and
(d) to fix, raise, maintain and stabilize the effective selling price of refined sugar.

11. In formulating and effectuating the aforesaid combination and conspiracy, defendants and co-conspirators did those things which, as hereinbefore charged, they combined and conspired to do, including, among other things, the following:

(a) caused brokers and other third parties to act as go-betweens in carrying price information and exchanging assurances on price actions between and among refiners;

(b) discussed data and reached agreements concerning the formulation of prepaid freight applications for the purpose and with the effect of maintaining uniform prepaid freight applications; and

(c) published basis price lists and prepaid freight application tables in accordance with agreements reached.

VI

EFFECTS

12. The aforesaid combination and conspiracy has had the following effects, among others:

(a) the price of refined sugar has been raised, fixed, maintained and stabilized at artificial and noncompetitive levels;

(b) purchasers of refined sugar have been deprived of free and open competition in the sale of refined sugar, and

(c) competition between and among defendants and co-conspirators has been restricted, suppressed and restrained.

VII

JURISDICTION AND VENUE

13. The aforesaid combination and conspiracy was in part entered into and carried out within the Northern District of

California and within the jurisdiction of this Court within five years next preceding the return of this indictment.

Dated:

A TRUE BILL

.....
Foreman

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THOMAS E. KAUPER
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Appendix E

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Northern District of California

Master File No. MDL 201

IN RE: SUGAR ANTITRUST LITIGATION
This Document Relates to:

The State of California, on behalf of itself, political subdivisions, public agencies, and districts of the State of California, and its citizens and residents, similarly situated,
Plaintiffs,

v.

California and Hawaiian Sugar Company; Holly Sugar Corporation; Consolidated Foods Corporation; American Crystal Sugar Company; Spreckels Sugar Company, a division of Amstar Corporation, and California Beet Growers Association, Ltd.,
Defendants.

Civil Action No.
C 75 1401 GHB

SECOND AMENDED CLASS ACTION COMPLAINT FOR TREBLE DAMAGES UNDER THE ANTITRUST LAWS

(JURY DEMANDED)
COMPLAINT

The State of California, acting on its own behalf and on behalf of a class consisting of all political subdivisions, public agencies and districts formed and existing under the laws of the State of California and similarly situated, and on behalf of a class consisting of its citizens and residents and similarly situated, demands a jury trial, and complains and alleges as follows:

I.

JURISDICTION AND VENUE

1. Plaintiff, the State of California, files complaint and invokes the jurisdiction of this court under the provisions of sections 4 and 16 of the Act of Congress of October 15, 1914 (15 U.S.C. §§ 15 and 26), commonly known as the Clayton Act, to recover treble damages for injuries sustained by the State of California, and by the two classes it represents, resulting from violations of sections 1 and 2 of the Act of Congress of July 8, 1890, as amended (15 U.S.C. §§ 1, 2), commonly known as the Sherman Act, and to prevent and restrain continuing violation by the defendants of the Act.

2. Each of the defendants maintains an office, or is an inhabitant, or has an agent, or transacts business, and is found within the Northern District of California. (15 U.S.C. § 22.)

3. Many of the unlawful acts done pursuant to the alleged combination and conspiracy have been performed within the Northern District of California and the interstate trade and commerce described in this complaint is carried on, in part, within this district.

II.

DEFINITIONS

4. As used herein:

(a) "refined sugar" means any grade or type of saccharine product derived from sugar beets or sugar cane which contains sucrose, dextrose or levulose;

(b) "refiner" means any company engaged in the processing of sugar beets or the refining of raw cane sugar into, and the sale of, refined sugar;

(c) "basis price" means the list price of refined sugar sold by a refiner f.o.b. its refinery or processing factory;

(d) "prepaid freight application," commonly known as a "prepay", means a portion of the delivered price for refined sugar equal in amount to a freight charge from a basing point to the customer's location;

(e) "delivered price" means the price of refined sugar delivered to the customer and generally consists of the basis price plus the prepaid freight application;

(f) "allowance" means a discount from delivered price;

(g) "effective selling price" means the price actually charged to the customer by the refiner and generally consists of the delivered price, less any allowance; and

(h) "The Market" means the states of California and Arizona and the cities of Las Vegas and Reno, Nevada. These states and cities have customarily been described by refiners as the California-Arizona territory.

III.

PLAINTIFF

5. Plaintiff, the State of California, brings this action under Rule 23 of the Federal Rules of Civil Procedure, on behalf of itself and two alleged classes.

6. Plaintiff, the State of California, purchases and, during the period in suit, has purchased, large amounts of refined sugar, either directly from one or more of the defendants, except defendant California Beet Growers Association (hereinafter referred to as "Association"), or other refiners or indirectly through distributors, including retail grocery stores, and has sustained damages as a result of the combination and conspiracy and violations of the autitrust laws herein alleged.

IV.

PUBLIC ENTITY CLASS

7. Plaintiff, the State of California, represents a class consisting of all public agencies, political subdivisions, public entities and districts which were formed and exist under the laws of the State of California and which have, during the period in suit, purchased refined sugar, either directly from one or more of defendants, except defendant Association, or other refiners, or indirectly through distributors. The number of members of this class is presently unknown, but it is estimated to be well in excess of several hundred governmental entities.

8. Because of the large number of public entity class members and the expense and burden to the parties and to the court of litigating each of their claims separately, it is impractical to bring them all before this court. This class action is superior to any other method for the fair and efficient adjudication of the controversy described herein.

9. The claims of plaintiff, the State of California, are substantially the same as the claims of the public entity class, except as to the amount of damages and threatened damage or injury the class has or will have by itself sustained; all other questions of fact and law are common to the class, including, but not limited to, the alleged combination, conspiracy and continuing course of conduct in violation of sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) and the effects of such violation.

10. The questions of law and fact common to the members of the public entity class predominate over any questions affecting only individual members.

11. Plaintiff, the State of California, through its Attorney General, can and will fairly and adequately represent the interests of the entire class.

V.

CONSUMER CLASS

12. Plaintiff, the State of California, in addition represents a consumer class pursuant to Rule 23 of the Federal Rules of Civil Procedure consisting of California citizens and residents who have purchased refined sugar at retail for use or consumption during the period of the alleged conspiracy. Citizens and residents purchase refined sugar at retail for use or consumption on the basis of household units. The number of members of this class, based on the number of household units in California, is estimated to be at least 7,000,000.

13. Because of the large number of consumer class members and the expense and burden to the parties and to the court of litigating each of their claims separately, it is impractical to bring them all before this court. This class action is superior to any other method for the fair and efficient adjudication of the controversy described herein.

14. The claims of plaintiff, the State of California, are substantially the same as the claims of the consumer class, except as to the amount of damages and threatened damage or injury the class has or will have by itself sustained; all other questions of fact and law are common to the class, including, but not limited to, the alleged combination, conspiracy and continuing course of conduct in violation of sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) and effects of such violation.

15. The questions of law and fact common to the members of the consumer class predominate over any questions affecting only individual members.

16. Plaintiff, the State of California, through its Attorney General, can and will fairly and adequately represent the interests of the entire class.

VI.

DEFENDANTS

17. Each of the corporations named below is made a defendant herein. Each is organized and exists under the laws of the state, and has its principal place of business in the city, indicated below, except that defendant American Crystal Sugar Company is a dissolved New Jersey Corporation whose principal place of business before dissolution was Denver, Colorado.

Name of Corporation	State of Incorporation	Principal Place of Business
California and Hawaiian Sugar Company	California	San Francisco, California
Holly Sugar Corporation	New York	Colorado Springs, Colorado
Consolidated Foods Corporation	Maryland	Chicago, Illinois
American Crystal Sugar Company	New Jersey	Denver, Colorado
Spreckels Sugar Company, a division of Amstar Corporation	Delaware	San Francisco, California
California Beet Growers Association, Ltd	California	Stockton, California

18. During all or part of the period covered by this complaint each of the defendant corporations, except defendant "Association", was engaged in the business of processing and selling refined sugar in The Market. The "Association" is a corporation and a trade association whose members consist of growers of sugar beets.

VII.

CO-CONSPIRATORS

19. Various corporations, firms and individuals not named as defendants in this complaint participated as co-conspirators

in the violations alleged and performed acts and made statements in furtherance thereof. Said co-conspirators include, but are not limited to McKeaney-Flavell Co., Inc., Saroni Sugar & Rice, Inc., Syrup Products, Ltd. (formerly known as Sugar Products Co., Inc.), and Wallenbrock-Bleuel, Inc.

VIII.

NATURE OF TRADE AND COMMERCE

20. Refined sugar is made by processing sugar beets or by refining raw sugar which is derived from crushed sugar cane. Grocery sugar is sold to grocery wholesalers and retailers for eventual sale to consumers; industrial sugar is sold in liquid or dry form in bags or bulk to firms engaged in the preparation and manufacture of food and beverages. Approximately 22 percent of the sugar sold in the United States is sold as grocery sugar; nearly all of the remainder is sold as industrial sugar.

21. Total domestic sales of refined sugar in 1972 amounted to approximately 212 million hundredweights, which had a value of about $2.5 billion. Of this, in excess of 23 million hundredweights or approximately $268 million worth of refined sugar was sold in The Market. Defendants, except for defendant "Association", accounted for over 99 percent of refined sugar sales in The Market.

22. During the period of time covered by this complaint, defendant California and Hawaiian Sugar Company received substantial quantities of raw sugar derived from sugar cane grown and crushed in the State of Hawaii. There was a substantial and continuous flow in interstate commerce of said raw sugar from the State of Hawaii to the State of California where it was refined by defendant California and Hawaiian Sugar Company and sold in The Market.

23. During the period of time covered by this complaint, substantial quantities of refined sugar, refined or processed in

the State of California, was sold and shipped by defendants, except defendant "Association", and co-conspirator corporations to customers located in the State of Arizona and in the cities of Las Vegas and Reno, Nevada. There was a substantial and continuous flow of refined sugar in interstate commerce from the cane refinery and the sugar beet processing factories of defendants and co-conspirators in the State of California to customers located in the State of Arizona and in the cities of Las Vegas and Reno, Nevada.

IX.

VIOLATIONS ALLEGED

24. Beginning sometime prior to 1949, the exact date being to the plaintiff unknown, and continuing thereafter at least through 1972, the defendants and co-conspirators engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in The Market in violation of section 1 of the Sherman Act, as amended (15 U.S.C. § 1); and have combined and conspired to monopolize and attempted to monopolize such trade and commerce in violation of section 2 of the Sherman Act (15 U.S.C. § 2). These violations of law may continue unless the relief hereinafter prayed for is granted.

25. The aforesaid combination and conspiracy to restrain trade in violation of section 1 of the Sherman Act consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were, among others:

(a) to fix and raise the basis prices of refined sugar;

(b) to fix prepaid freight applications;

(c) to eliminate, reduce and prevent the giving of allowances to customers for refined sugar; and

(d) to fix, raise, maintain and stabilize the effective selling price of refined sugar.

26. In formulating and effectuating the aforesaid combination and conspiracy to restrain trade in violation of section 1 of the Sherman Act, defendants and co-onspirators did those things which, as hereinbefore alleged, they combined and conspired to do, including, among other things, the following:

(a) caused brokers and other third parties to act as go-betweens in carrying price information and exchanging assurances on price actions between and among refiners;

(b) discussed data and reached agreements concerning the formulation of prepaid freight applications for the purpose and with the effect of maintaining uniform prepaid freight applications; and

(c) published basis price lists and prepaid freight application tables in accordance with agreements reached.

X.

EFFECTS

27. The aforesaid combination and conspiracy has had, among others, the following effects:

(a) the price of refined sugar has been raised, fixed, maintained and stabilized at artificial and noncompetitive levels;

(b) purchasers of refined sugar have been deprived of free and open competition in the sale of refined sugar; and

(c) competition between and among defendants and co-conspirators has been restricted, suppressed and restrained.

XI.

INJURY TO PLAINTIFFS

28. During and throughout the period of the aforesaid conspiracy, plaintiff and the public entity class it represents purchased substantial quantities of refined sugar, either directly from the defendants, except defendant "Association", or other refiners

or indirectly through distributors. By reason of the defendants' illegal conduct, plaintiff and the public entity class it represents was compelled to pay and has paid substantially higher prices for refined sugar than they would have paid had the defendants' combination and conspiracy not existed.

29. During and throughout the period of the aforesaid conspiracy, plaintiff and the consumer class it represents purchased substantial quantities of refined sugar from the defendants, except defendant "Association", or other refiners indirectly through distributors including retail grocery stores. By reason of the defendants illegal conduct, Plaintiff and the consumer class it represents were compelled to pay and have paid substantially higher prices for refined sugar than they would have paid had the defendants' combination and conspiracy not existed.

30. As a result of the defendants' illegal combination and conspiracy, plaintiff and the public entity and consumer classes it represents have each sustained substantial loss and damage in its property in an amount which is presently undetermined. When such amount has been ascertained, plaintiff will seek leave of court to amend this complaint to insert said amount herein.

XII.

FRAUDULENT CONCEALMENT

31. Plaintiff State of California and every member of the two classes it represents had no knowledge of the aforesaid combination and conspiracy, or of any fact which through the exercise of reasonable diligence would have led to the discovery thereof, prior to the issuance of an indictment against said defendants relating to the acts complained of herein on December 19, 1974. Plaintiff State of California and every member of the two classes it represents could not have discovered, by the exercise of due diligence, the alleged combination and conspiracy at an earlier date since the conspiracy had been fraudulently concealed by defendants by various means and methods used to avoid the detection thereof.

32. By virtue of this fraudulent concealment, plaintiff asserts the tolling of any applicable statute or period of limitations affecting the rights of action of plaintiff and the two classes it represents.

XIII.

EQUITABLE RELIEF

33. Plaintiff and the two classes it represents are now and have been purchasers of refined sugar.

34. The violations herein alleged have caused and are causing great, lasting and irreparable injuries to plaintiff, to the two classes it represents and to the public interest in general, and can be expected to continue unless and until enjoined by the court.

XIV.

JURY DEMAND

35. Plaintiff respectfully demands a jury pursuant to Rule 35(b) of the Federal Rules of Civil Procedure.

PRAYER FOR RELIEF

36. WHEREFORE, plaintiffs pray:

A. That the court adjudge and decree that the aforesaid combination and conspiracy, and the acts done in pursuance thereof, were and are in unlawful restraint of trade and commerce, in violation of section 1 of the Sherman Act;

B. That the court adjudge and decree that the defendants have combined and conspired to monopolize and attempted to monopolize trade and commerce in violation of section 2 of the Sherman Act;

C. That the court determine, as provided by Rule 23 of the Federal Rules of Civil Procedure, that this action is a proper class action as to both public entities and consumers

and that the State of California is a proper class representative as to each class, and that the best practicable notice of this action be given to each and every member of the two classes represented by plaintiff in this action;

D. That plaintiff and the two classes represented herein recover from defendants three fold the damages determined to have been sustained, and that joint and several judgments in favor of plaintiff and the two classes, respectively, be entered herein against the defendants and each of them;

E. That the defendants be enjoined from continuing the combination and conspiracy herein alleged, and from entering into any combination, conspiracy, agreement, understanding or concert of action having similar purposes or effects;

F. That the plaintiff and the two classes represented herein recover from defendants the cost of this suit and reasonable attorneys' fees, as provided in section 4 of the Clayton Act; and

G. That the plaintiff and the two classes represented herein have such other, further and different relief as the nature of this case may require or as to the court shall seem just.

DATED: March 31, 1976

EVELLE J. YOUNGER
Attorney General

WARREN J. ABBOTT
Assistant Attorney General

MICHAEL I. SPIEGEL
Deputy Attorney General

RICHARD N. LIGHT
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Appendix F

FEB 7 1976

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ENDORSED—FILED
FEB 4 - 1976
CARL M. OLSEN, Clerk
BY F. MELANEPHY
Deputy Clerk

Superior Court of the State of California
City and County of San Francisco

The State of California, on behalf of itself and its citizens and residents similarly situated, and as *parens patriae,*
Plaintiffs,

v.

California and Hawaiian Sugar Company; Holly Sugar Corporation; Consolidated Foods Corporation; American Crystal Sugar Company; Spreckels Sugar Company, a division of Amstar Corporation, and; California Beet Growers Association, Ltd.,
Defendants.

No. 701-607

COMPLAINT FOR TREBLE DAMAGES AND FOR EQUITABLE RELIEF UNDER THE CALIFORNIA ANTI-TRUST LAWS

The State of California, acting on behalf of itself and a class consisting of California citizens and residents and similarly situated, and as *parens patriae,* brings this complaint against the defendants named herein and alleges:

I.

FIRST CAUSE OF ACTION
JURISDICTION AND VENUE

1. Plaintiff, the State of California, files complaint and invokes the jurisdiction of this court under the provisions of section 16750, of the California Business and Professions Code, to recover treble damages for injuries sustained by it and by the class it represents, arising from violation by defendants of section 16720 of the California Business and Professions Code, commonly known as the California Cartwright Act.

2. Plaintiff State of California brings this action through its Attorney General, Evelle J. Younger, to recover damages for itself and the class it represents based on California Business and Professions Code section 16750(c) and California Civil Code section 382;

3. Each defendant transacts business within the State of California, and resides or is found or does business, or has an agent who resides or is found or does business, or is subject to service of process, in the City and County of San Francisco.

4. Many of the unlawful acts done pursuant to the alleged combination and conspiracy have been performed within the City and County of San Francisco, and the trade and commerce described in this complaint is carried on, in part, within the City and County of San Francisco.

DEFINITIONS

5. As used herein:

(a) "refined sugar" means any grade or type of saccharine product derived from sugar beets or sugar cane which contains sucrose, dextrose or levulose;

(b) "refiner" means any company engaged in the processing of sugar beets or the refining of raw cane sugar into, and the sale of refined sugar;

(c) "basis price" means the list price of refined sugar sold by a refiner f.o.b. its refinery or processing factory;

(d) "prepaid freight application," commonly known as a "prepay", means a portion of the delivered price for refined sugar equal in amount to a freight charge from a basing point to the customer's location;

(e) "delivered price" means the price of refined sugar delivered to the customer and generally consists of the basis price plus the prepaid freight application;

(f) "allowance" means a discount from delivered price;

(g) "effective selling price" means the price actually charged to the customer by the refiner and generally consists of the delivered price, less any allowance; and

(h) "The Market" means the states of California and Arizona and the cities of Las Vegas and Reno, Nevada. These states and cities have customarily been described by refiners as the California-Arizona territory.

PLAINTIFFS

6. Plaintiff, the State of California, purchases and, during the period in suit, has purchased substantial quantities of refined sugar from one or more defendants, except defendant California Beet Growers Association (hereinafter referred to as "Association"), or other refiners, including indirectly through, among other intermediaries, retail grocery stores, and has sustained damages as a result of the combination and conspiracy and violations of the antitrust laws herein alleged.

CONSUMER CLASS

7. Plaintiff, the State of California, represents a consumer class pursuant to California Civil Code section 382 consisting of California citizens and residents who have purchased refined sugar at retail for use or consumption during the period of the alleged conspiracy. Refined sugar is purchased by citizens and residents at retail for use or consumption on the basis of household units. The number of members of this class based on the number of household units in California, accordingly, is estimated to be at least 7 million.

8. The alleged class is ascertainable and has a well defined community of interest in the questions of fact and law arising from the matters alleged herein.

9. Because of the large number of class members and the expense and burden to the parties and to the court of litigating each of their claims separately, it is impractical to bring them all before this court. This class action is superior to any other method for the fair and efficient adjudication of the controversy described herein.

10. The claims of plaintiff, the State of California, are substantially the same as the claims of the class, except as to the amount of damages the class has or will have by itself sustained; all other questions of fact and law are common to the class, including, but not limited to, the alleged combination, conspiracy and continuing course of conduct in violation of section 16720 of the California Business and Professions Code and the effects of such violation.

11. The questions of law and fact common to the members of the class predominate over any questions affecting only individual members.

12. Plaintiff, the State of California, through its Attorney General, can and will fairly and adequately represent the interests of the entire class.

DEFENDANTS

13. Each of the corporations named below is made a defendant herein. Each is organized and exists under the laws of the state, and has its principal place of business in the city, indicated below, except the defendant American Crystal Sugar Company is a dissolved New Jersey Corporation whose principal place of business before dissolution was Denver, Colorado.

Name of Corporation	State of Incorporation	Principal Place of Business
California and Hawaiian Sugar Company	California	San Francisco, California
Holly Sugar Corporation	New York	Colorado Springs, Colorado
Consolidated Foods Corporation	Maryland	Chicago, Illinois
American Crystal Sugar Company	New Jersey	Denver, Colorado
Spreckels Sugar Company, a division of Amstar Corporation	Delaware	San Francisco, California
California Beet Growers Association, Ltd.	California	Stockton, California

14. During all or part of the period covered by this complaint each of the defendant corporations, except defendant "Association", was engaged in the business of processing and selling refined sugar in The Market. The "Association" is a corporation and a trade association whose members consist of growers of sugar beets.

CO-CONSPIRATORS

15. Various corporations, firms and individuals not named as defendants in this complaint participated as co-conspirators in the violations alleged and performed acts and made statements in furtherance thereof. Said co-conspirators include, but are not limited to McKeaney-Flavell Co., Inc., Saroni Sugar & Rice, Inc., Syrup Products, Ltd. (formerly known as Sugar Products Co., Inc.), and Wallenbrock-Bleuel, Inc.

NATURE OF TRADE AND COMMERCE

16. Refined sugar is made by processing sugar beets or by refining raw sugar which is derived from crushed sugar cane. Grocery sugar is sold to grocery wholesalers and retailers for eventual sale to consumers; industrial sugar is sold in liquid or dry form in bags or bulk to firms engaged in the preparation and manufacture of food and beverages. Approximately 22 percent of the sugar sold in the United States is sold as grocery sugar; nearly all of the remainder is sold as industrial sugar.

17. Total domestic sales of refined sugar in 1972 amounted to approximately 212 million hundredweights, which had a value of about $2.5 billion. Of this, in excess of 23 million hundredweights or approximately $268 million worth of refined sugar was sold in The Market. Defendants, except for defendant "Association", accounted for over 99 percent of refined sugar sales in The Market.

VIOLATIONS ALLEGED

18. Beginning sometime prior to 1949, the exact date being to the plaintiff unknown, and continuing thereafter at least through 1972, the defendants and co-conspirators engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in The Market in violation of California Business and Professions Code section 16720; and have combined and conspired to monopolize such trade and commerce in violation of California Business and Professions Code section 16720.

19. The aforesaid combination and conspiracy to restrain trade in violation of California Business and Professions Code

section 16720 consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were, among others:

(a) to fix and raise the basis price of refined sugar;

(b) to fix prepaid freight applications;

(c) to eliminate, reduce and prevent the giving of allowance to customers for refined sugar; and

(d) to fix, raise, maintain and stabilize the effective selling price of refined sugar.

20. In formulating and effectuating the aforesaid combination and conspiracy to restrain trade in violation of section 1 of the Sherman Act, defendants and co-conspirators did those things which, as hereinbefore alleged, they combined and conspired to do, including among other things, the following:

(a) cause brokers and other third parties to act as go-betweens in carrying price information and exchanging assurances on price actions between and among refiners;

(b) discussed data and reached agreements concerning the formulation of prepaid freight applications for the purpose and with the effect of maintaining uniform prepaid freight applications; and

(c) published basis price lists and prepaid freight application tables in accordance with agreements reached.

EFFECTS

21. The aforesaid combination and conspiracy had, among others, the following effects:

(a) the price of refined sugar has been raised, fixed, maintained and stabilized at artificial and non-competitive levels;

(b) purchasers of refined sugar have been deprived of free and open competition in the sale of refined sugar; and

(c) competition between and among defendants and co-conspirators has been restricted, suppressed and restrained.

INJURY TO PLAINTIFFS

22. During and throughout the period of the aforesaid conspiracy, plaintiff and the consumer class it represents, purchased substantial quantities of refined sugar from defendants, except defendant "Association", or other refiners, including indirectly through, among other intermediaries, retail grocery stores. By reason of the defendants' illegal conduct, plaintiff and the consumer class it represents, were compelled to pay and have paid substantially higher prices for refined sugar than they would have paid had the defendants' combination and conspiracy not existed.

23. As a result of the defendants' illegal combination and conspiracy, plaintiff and the consumer class it represents, have sustained substantial loss and damage in their property in an amount which is presently undetermined. When such amounts have been ascertained, plaintiff will seek leave of court to amend this complaint to insert said amount herein.

FRAUDULENT CONCEALMENT

24. Plaintiff State of California and every member of the consumer class it represents had no knowledge of the aforesaid combination and conspiracy, or of any fact which through the exercise of reasonable diligence would have led to the discovery thereof, prior to the issuance of an indictment against said defendants relating to the acts complained of herein on December 19, 1974. Plaintiff State of California and every member of the class it represents could not have discovered, by the exercise of due diligence, the alleged combination and conspiracy at an earlier date since the conspiracy had been fraudulently concealed by defendants by various means and methods used to avoid the detection thereof.

25. By virtue of this fraudulent concealment, plaintiff asserts the tolling of any applicable statute or period of limitations affecting the rights of action of plaintiff, on behalf of itself and the class it represents.

II.

SECOND CAUSE OF ACTION
(PARENS PATRIAE)

26. Plaintiff, State of California, realleges and incorporates by reference Paragraphs 3 through 21, inclusive, except paragraphs 7 through 12, of the First Cause of Action, as though set forth at length herein.

27. Plaintiff, the State of California, as *parens patriae,* files complaint and invokes the jurisdiction of this court under the provisions of section 16750 of the California Business and Professions Code, to recover treble damages for injuries sustained by its citizens arising from violations by defendants of section 16720 of the California Business and Professions Code, commonly known as the California Cartwright Act.

28. Plaintiff State of California brings this action *parens patriae* as representative of its citizens to recover damages through its Attorney General, based on the common law, and based on California Constitution Article 5, section 13 establishing the Attorney General as the chief law officer of the State.

29. Plaintiff, the State of California, as sovereign, protector, guardian, and agent of all its citizens sues *parens patriae* as representative of its citizens who are natural persons and who have not sued in their own right. This *parens patriae* action is brought for treble the amount of damages suffered by the citizens of California as a result of defendants' violation of the antitrust laws as alleged herein. Plaintiff, the State of California, brings this action *parens patriae* pursuant to its duty to protect the interests of its citizens, where it is impractical or impossible for its

citizens to protect their own interests by bringing individual suits to recover damages.

INJURY TO PLAINTIFFS

30. During and throughout the period of the aforesaid conspiracy, plaintiff and the California citizens here represented *parens patriae,* purchased substantial quantities of refined sugar from defendants, except defendant "Association", or other refiners, including indirectly through, among other intermediaries, retail grocery stores. By reason of the defendants' illegal conduct, plaintiff and the California citizens here represented *parens patriae,* were compelled to pay and have paid substantially higher prices for refined sugar than they would have paid had the defendants' combination and conspiracy not existed.

31. As a result of the defendants' illegal combination and conspiracy, plaintiff and the California citizens here represented *parens patriae,* have sustained substantial loss and damage in their property in an amount which is presently undetermined. When such amounts have been ascertained, plaintiff will seek leave of court to amend this complaint to insert said amount herein.

FRAUDULENT CONCEALMENT

32. Plaintiff State of California and every California citizen here represented *parens patriae,* had no knowledge of the aforesaid combination and conspiracy, or of any fact which through the exercise of reasonable diligence would have led to the discovery thereof, prior to the issuance of an indictment against said defendants relating to the acts complained of herein on December 19, 1974. Plaintiff State of California, and every California citizen here represented *parens patriae,* could not have discovered by the exercise of due diligence the alleged combination and conspiracy at an earlier date since the conspiracy had

been fraudulently concealed by defendants by various means and methods used to avoid the detection thereof.

33. By virtue of this fraudulent concealment, plaintiff asserts the tolling of any applicable statute or period of limitations affecting the rights of action of plaintiff, on behalf of itself and the California citizens it represents as *parens patriae.*

III.

THIRD CAUSE OF ACTION

(Equitable relief with Exemplary Damages)

34. Plaintiff, the State of California, realleges and incorporates by reference paragraphs 3 through 21, inclusive, except paragraphs 7 through 12, of the First Cause of Action, as set forth at length herein.

35. Plaintiff, the State of California files complaint and invokes the jurisdiction of this court under the provisions of sections 16754 and 16754.5 of the California Business and Professions Code for equitable relief by way of injunction and return or disgorging of all overcharges with exemplary damages, arising from violation by defendants of section 16720 of the California Business and Professions Code, commonly known as the California Cartwright Act.

36. Plaintiff State of California brings this action through its Attorney General for equitable relief by way of injunction and return of disgorging of overcharges based on California Business and Professions Code sections 16754 and 16754.5, and seeks exemplary damages based on California Civil Code section 3294.

INJURY TO PLAINTIFFS

37. During and throughout the period of the aforesaid conspiracy, plaintiff and citizens of California purchased substantial quantities of refined sugar from defendants, except defendant

"Association", or other refiners, including indirectly through, among other intermediaries, retail grocery stores. By reason of the defendants' illegal conduct, plaintiff and the citizens of California were compelled to pay and have paid substantially higher prices for refined sugar than they would have paid had the defendants' combination and conspiracy not existed.

38. As a result of the defendants' illegal combination and conspiracy, plaintiff and California citizens have sustained substantial loss and damage in their property in an amount which is presently undetermined. When such amounts have been ascertained, plaintiff will seek leave of court to amend this complaint to insert said amount herein.

FRAUDULENT CONCEALMENT

39. Plaintiff State of California and every California citizen had no knowledge of the aforesaid combination and conspiracy. or of any fact which through the exercise of reasonable diligence would have led to the discovery thereof, prior to the issuance of an indictment against said defendants relating to the acts complained of herein on December 19, 1974. Plaintiff State of California and every California citizen could not have discovered, by the exercise of due diligence, the alleged combination and conspiracy at an earlier date since the conspiracy had been fraudulently concealed by defendants by various means and methods used to avoid the detection thereof.

40. By virtue of this fraudulent concealment, plaintiff asserts the tolling of any applicable statute or period of limitations affecting the rights of action of plaintiff and the citizens of California.

41. Plaintiff the State of California and many of its citizens are now and have been purchasers of refined sugar.

42. The violations herein alleged have caused and are causing great, lasting and irreparable injuries to plaintiff, to many of its

citizens, and to the public interest in general, and can be expected to continue unless and until enjoined by the Court in accordance with California Business and Professions Code section 16754.5.

43. Complete justice requires that defendants be required to return to plaintiff State of California and to those citizens who have been purchasers of refined sugar, or otherwise to disgorge, the illegal overcharges they have realized as a result of the violations herein alleged, and that they in addition be required to pay exemplary damages pursuant to California Civil Code section 3294 to plaintiff State of California and to its citizens who have suffered injury as a result of the violations herein alleged.

PRAYER FOR RELIEF

44. WHEREFORE, plaintiffs pray:

A. That the court adjudge and decree that the aforesaid combination and conspiracy, and the acts done in pursuance thereof, were and are in unlawful restraint of trade and commerce, in violation of section 16720 of the California Business and Professions Code.

B. That the court adjudge and decree that the defendants have combined and conspired to monopolize trade and commerce in violation of section 16720 of the California Business and Professions Code.

C. That the court determine that this action is a proper consumer class action and that the State of California is a proper class representative, and that the best practicable notice of this action be given to each and every member of the class represented by plaintiff in this action;

D. That, in the event the court determines that this action is not a proper consumer class action, the court determine instead that the State of California may bring this action *parens patriae* as representative of its citizens;

E. That plaintiff and the class represented herein, or in lieu of said class plaintiff acting as *parens patriae,* recover from defendants three-fold the damages determined to have been sustained, and that joint and several judgments in favor of plaintiff and the class, or in lieu of said class plaintiff acting as *parens patriae,* respectively, be entered herein against the defendants and each of them;

F. That the defendants be enjoined from continuing the combination and conspiracy herein alleged, and from entering into any combination, conspiracy, agreement, understanding or concert of action having similar purposes or effects;

G. That the Court, in the event it determines that this action is not a proper consumer class action and that the State of California may not bring this action *parens patriae* as representative of its citizens, instead order defendants to return to plaintiff State of California and to its citizens, or otherwise disgorge, the illegal overcharges the defendants have realized, and that it enter joint and several judgments in favor of plaintiff and its citizens against the defendants and each of them;

H. That, in the event the Court orders defendants to return the illegal overcharges they have realized, defendants in addition be required to pay exemplary damages to plaintiff and its injured citizens;

I. That the plaintiff recover from defendants the cost of this suit and reasonable attorneys' fees, as provided in section 16750(a) of the California Business and Professions Code; and

J. That the plaintiff and the class represented herein, or in lieu of said class plaintiff acting as *parens patriae,* have such other, further and different relief as the nature of this case may require or as to the court shall seem just.

DATED: February 4, 1976

EVELLE J. YOUNGER
Attorney General of the State of California

WARREN J. ABBOTT
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MICHAEL I. SPIEGEL
RICHARD N. LIGHT
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Appendix G

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Endorsed—Filed Dec 16 1975
Carl M. Olsen, Clerk
By F. Melanephy
Deputy Clerk

In the Superior Court of the State of California
In and for the City and County of San Francisco

Madelyne Brinker, on behalf of herself and all those similarly situated,
Plaintiffs,

vs.

Amalgamated Sugar Company; American Crystal Sugar Company; California and Hawaiian Sugar Company; Great Western Sugar Company; Holly Sugar Corporation; National Sugarbeet Growers Federation; Amstar Corporation; and Utah Idaho Sugar Company,
Defendants.

No. 699 579

COMPLAINT FOR UNFAIR TRADE PRACTICES IN RESTRAINT OF TRADE (BUSINESS AND PROFESSIONS CODE, SECTIONS 16600-17096) CLASS ACTION

I.

JURISDICTION AND VENUE

This Complaint is filed and these proceedings are instituted under Section 16750 of the California Business and Professions Code, §§ 16600-17096, commonly known as the Cartwright Act, to redress injuries sustained by Plaintiff and members of the class as a result of the violations of said statutes by Defendants.

II.

PLAINTIFF

The Plaintiff in this action is MADELYNE BRINKER, an individual who during the relevant time period as hereinafter defined, purchased refined sugar in its original bulk package at retail from all Defendants through retail outlets supplied by one or more of the Defendants. As a result of the illegal activities of Defendants and their co-conspirators described herein, the price paid by said Plaintiff for such refined sugar was illegally fixed, raised, stabilized and maintained.

III.

DEFINITIONS

A. *"Allowance"* means a discount from delivered price;

B. *"Basis price"* means the list price of refined sugar to be sold by a refiner f.o.b. its refinery or processing factory;

C. *"Delivered price"* means the price of refined sugar delivered to the customer and generally consists of the basis price plus the prepaid freight application;

D. *"Effective selling price"* means the price actually charged to the customer by the refiner and generally consists of the delivered price, less any allowance;

E. *"Prepaid freight application,"* commonly known as a "prepay," means a portion of the delivered price for refined sugar equal

in amount to a freight charge from a basing point to the customer's location;

F. *"Refined sugar"* means any grade or type of saccharine product derived from sugar beets or sugar cane which contains sucrose, dextrose or levulose;

G. *"Refiner sugar"* means any company engaged in the processing of sugar beets or the refining of raw cane sugar into, and the sale of, refined sugar.

IV.

PARTIES DEFENDANT

The following Defendants reside or may be found in the City and County of San Francisco, California:

A. Amalgamated Sugar Company is incorporated in the State of Utah with its principal place of business in Ogden, Utah.

B. American Crystal Sugar Company is incorporated in the State of New Jersey with its principal place of business in Denver, Colorado. On June 14, 1974, the Defendant, American Crystal Sugar Company was dissolved. Its successor is the American Crystal Sugar Company of Fargo, North Dakota, a Minnesota cooperative.

C. California and Hawaiian Sugar Company is incorporated in the State of California with its principal place of business in San Francisco, California.

D. Great Western Sugar Company is incorporated in the State of Delaware and its principal place of business is in Denver, Colorado.

E. Holly Sugar Corporation is incorporated in the State of New York and its principal place of business is in Colorado Springs, Colorado.

F. National Sugarbeet Growers Federation is incorporated in the State of Colorado with its principal place of business in Greeley, Colorado. The National Sugarbeet Growers Federation

is an agricultural cooperative which is composed of sixteen member associations of sugar beet growers located in ten Western States. Among other things, the National Federation acts as a bargaining agent for growers in contracting with refiners for the sale of the growers' sugar beets.

G. Amstar Corporation is incorporated in the State of Delaware with its principal place of business in New York City, New York.

H. Utah-Idah [sic] Sugar Company (hereinafter referred to as "U-I") is hereby made a defendant herein. U-I was incorporated in 1907 under the laws of the State of Utah. U-I's principal place of business is in Salt Lake City, Utah. During all or part of the period of time covered by this Complaint, Defendant U-I engaged in the business of processing and selling refined sugar in The Market.

V.

During all or part of the period covered by this Complaint, each of the Defendant corporations except National Sugarbeet Growers Federation was engaged in the business of processing and selling refined sugar in The Market.

VI.

CO-CONSPIRATORS

Various corporations, firms and individuals including McKeany-Flavell Company, Inc., Guell Brokerage, K.D. Pierson, Inc. and Imperial Sugar Company, Inc. participated as co-conspirators with Defendants in the unlawful conduct alleged herein and performed acts and made statements in furtherance of such conspiracy.

VII.

TRADE AND COMMERCE INVOLVED

Refined sugar is made by processing sugar beets or by refining raw sugar which is derived from crushed sugar cane. Grocery

sugar is sold to grocery wholesalers and retailers for eventual sale to consumers;

VIII.

Total California sales of refined sugar in 1972 amounted to approximately 20 million hundredweights which had a value of about $23.5 million. Defendants accounted for over most of the refined sugar sales in The Market.

IX.

UNLAWFUL CONDUCT ALLEGED

Beginning with a period prior to 1955, the exact date to the Plaintiffs unknown, and continuing thereafter at least through 1972, the Defendants and co-conspirators engaged in an agreement, scheme, combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in The Market in violation of Section 16720 of the Business and Professions Code, as amended.

X.

The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were, among others:

(a) to fix and raise the basis prices of refined sugar;

(b) to fix prepaid freight applications;

(c) to eliminate, reduce and prevent giving of allowances to customers for refined sugar; and

(d) to fix, raise, maintain and stabilize the effective selling price of refined sugar.

In formulating and effectuating the aforesaid combination and conspiracy, Defendants and co-conspirators did those things which,

as hereinbefore alleged, they combined and conspired to do, including, among other things, the following:

(a) caused brokers and other third parties to act as go-betweens in carrying price information and exchanging assurances on price actions between and among refiners;

(b) discussed data and reached agreements concerning the formulation of prepaid freight applications for the purpose and with the effect of maintaining uniform prepaid freight applications; and

(c) published basis price lists and prepaid freight application tables in accordance with agreements reached.

XII. [sic]

EFFECTS OF CONSPIRACY

The aforesaid combination and conspiracy has had the following effects, among others:

(a) the price of refined sugar has been raised, fixed, maintained and stabilized at artificial and non-competitive levels;

(b) Plaintiffs and all other purchasers of refined sugar have been deprived of free and open competition in the purchase and sale of refined sugar; and

(c) competition between and among Defendants and co-conspirators has been restricted, suppressed and restrained.

XIII.

DAMAGES

As a direct result of the aforesaid combination and conspiracy, Plaintiffs and each member of Plaintiff Class have been damaged in that they purchased refined sugar at prices which were unreasonably and unlawfully higher than they would have been in the absence of said unlawful conspiracy. Damages to Plaintiffs are substantial but presently undetermined. Damages to members of

Plaintiff Class are not presently determined but will exceed $50,000,000.

XIV.

CLASS ACTION ALLEGATIONS

This action is brought as a class action pursuant to California Code of Civil Procedure, Section 382 by Plaintiff on behalf of herself, and on behalf of the class of persons similarly situated. The Class consists of all private individuals who, during the relevant time period, have purchased refined sugar at retail in its original bulk-package forms within the State of California through retail outlets that sell refined sugar supplied by one or more of the Defendants in its original bulk-package form for consumption off the premises (hereinthroughout referred to as "the Class").

XV.

The Class is believed to consist of approximately 20 million persons. This number is so numerous that joinder of all members of the Class is impractical but not so great as to create difficulties in the management of this action as a class action.

XVI.

Plaintiff is a member of said Class; her claims are typical of the claims of the Class; and she will fairly and adequately protect the interests of the Class in this action.

XVII.

There are questions of law and questions of fact common to members of the Class relative to this action which predominate over any questions of law or any questions of fact affecting only individual members of the Class and a class action is superior to other available methods for a fair and efficient adjudication of the controversy.

XVIII.

Defendants have acted and refuse to act on grounds generally applicable to the class.

XIX.

INJURY TO INTERVENORS

As a result of Defendants' aforesaid unlawful conduct, Plaintiff and the members of the Class that Plaintiff represents have been damaged in substantial amounts not as yet fully ascertained and which Plaintiff begs leave to prove at the trial hereof.

XX.

FRAUDULENT CONCEALMENT AND TOLLING OF STATUTE OF LIMITATIONS

The named Plaintiff had no knowledge of the violations of the unfair trade practices hereinabove alleged, or of any facts that might have led to their discovery until the institution of proceedings against the Defendant corporations by the United States on December 19, 1974. Plaintiff could not have uncovered the violations at an earlier date by the exercise of due diligence inasmuch as the violations had been fraudulently concealed by Defendants through various means and methods designed to avoid detection. Said fraudulent concealment had the effect of tolling the running of the Statute of Limitations, and the relevant time period for purpose of this action includes such period of concealment.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray:

A. That this Court find that this action may properly be maintained as a class action under Section 382 of the California Code of Civil Procedure.

B. That Plaintiff individually and each member of Plaintiff Class recover three-fold the damages sustained by each of them, and

C. That judgments be entered in favor of each member of Plaintiff Class and against each Defendant in an amount treble the damages sustained by each member of the Class.

D. That Plaintiff and each member of the class represented by Plaintiff recover the costs of litigation, including a reasonable attorneys' fee for counsel for Plaintiff Class.

E. That the Plaintiff and members of Plaintiff Class have such other and further relief as the Court may deem necessary or proper under the circumstances.

Dated: December 16, 1975.

LOVITT & HANNAN, INC.
RONALD LOVITT
J. THOMAS HANNAN

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1370

IN RE SUGAR ANTITRUST LITIGATION
MDL-201

CALIFORNIA AND HAWAIIAN SUGAR COMPANY, AMALGAMATED SUGAR COMPANY, AMERICAN CRYSTAL SUGAR COMPANY, AMSTAR CORPORATION, THE GREAT WESTERN SUGAR COMPANY, HOLLY SUGAR CORPORATION, UNION SUGAR DIVISION, CONSOLIDATED FOODS CORPORATION, U AND I INCORPORATED, and CALIFORNIA BEET GROWERS ASSOCIATION, LTD.,

Petitioners,

vs.

STATE OF CALIFORNIA AND MADELYNE BRINKER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Respondent State of California's Brief in Opposition

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Petitioners,

VS.

STATE OF CALIFORNIA AND MADELYNE BRINKER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether an action brought in California Superior Court by the State of California on behalf of itself and its citizens and residents, and expressly grounded solely on California

state antitrust laws, is removable under 28 U.S.C. § 1441 (b) as an action "arising under" federal law.

STATUTES INVOLVED

This case involves those statutes set forth in the Petition, pp. 4-6, and in addition California Business and Professions Code section 16760, which in pertinent part is as follows:

> "(a) (1) The Attorney General may bring a civil action in the name of the people of the State of California, as parens patriae on behalf of natural persons residing in the state, in the superior court of any county which has jurisdiction of a defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of this chapter. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to . . . (ii) any business entity."

STATEMENT OF THE CASE

Respondent State of California filed its complaint in the Superior Court of the State of California on February 4, 1976, seeking recovery of damages for itself and its citizens and residents based on alleged violations by defendants[1] of the California antitrust laws, commonly referred to as the California Cartwright Act (Calif. Bus. & Prof. Code § 16600 *et seq.*). The complaint alleged a class of consumers under California Code of Civil Procedure section 382, a common law *parens patriae* claim,[2] and sought equitable relief under California Business and Professions Code sections 16754 and 16754.5 (Pet. App. F).

1. Those petitioners which are defendants in California's action are: California and Hawaiian Sugar Company, American Crystal Sugar Company, Amstar Corporation, Holly Sugar Corporation, Union Sugar Division, Consolidated Foods Corporation, and California Beet Growers Association, Ltd. The remaining three petitioners, together with certain of those that are defendants in California's action, are defendants in the action by Madelyne Brinker.

On March 18, 1976, petitioners removed respondent's action to the United States District Court for the Northern District of California. Removal jurisdiction was alleged based on federal question grounds (28 U.S.C. § 1441 (b)) and on the ground of diversity as to separate and independent claims (28 U.S.C. § 1441 (c)).[3]

On March 31, 1976, respondent State of California moved the district court for an order remanding its action to the California Superior Court.

On July 23, 1976, the district court denied respondent's motion to remand. The district court in its memorandum decision assumed without discussion that California's action arose under federal, not state, law, and requested review by the Court of Appeals and by this Court of this Court's derivative jurisdiction doctrine (Pet. App. C).

The Court of Appeals reversed, ordering that respondent's action and the action by respondent Brinker be remanded to state court. The Court of Appeals concluded that California's claims in its complaint (1) "arose under state law", and (2) "do not arise under federal law" (Pet. App. A, p. 7).

REASONS FOR DENYING THE WRIT

The result reached by the Court of Appeals is correct. Petitioners raise no serious challenge on legal grounds.

2. California Business and Professions Code section 16760, creating a California statutory *parens patriae* action, was enacted in 1977, after the filing of California's complaint.

3. Petitioners no longer defend removal on the basis of diversity.

Petitioners resort to making extreme demands upon this Court under which: (1) established tests for removal are ignored, (2) state antitrust laws generally, and California's in particular, would be preempted with no prior opportunity for consideration by California courts of relevant state statutes, (3) removal jurisdiction of federal district courts would be expanded, and (4) the doctrine of derivative jurisdiction would be eliminated.

I. Respondent California's Action "Arises Under" State, Not Federal, Law.

A. PETITIONERS IGNORE ESTABLISHED TESTS FOR REMOVAL.

Petitioners ignore established tests for removal jurisdiction. Application of established tests dictates the correctness of the conclusion by the Court of Appeals that California's claims in its complaint filed in California Superior Court ". . . arise under state law and do not arise under federal law." (Pet. App. A, p. 7).

An action "arises under" federal or state law depending on how plaintiff ". . . casts his action." *Pan American Petroleum Corp. v. Superior Court,* 366 U.S. 656, 662 (1961). The plaintiff is ". . . master to decide what law he will rely upon . . .." *The Fair v. Kohler Die Co.,* 228 U.S. 22, 25 (1913). When a plaintiff has elected to proceed under state law in state court, it is thus ". . . immaterial . . . that the plaintiff could have elected to proceed on a federal ground." *Pan American Petroleum Corp. v. Superior Court, supra* at 663.[4]

4. The tests are essentially the same whether the question arises from a motion to dismiss an action invoking the original jurisdiction of the federal court, *Bell v. Hood,* 327 U.S. 678, 679 (1946), from a motion to dismiss an action invoking the original jurisdiction of a state court, *Pan American Petroleum Corp. v. Superior Court, supra* at 657, or from, as here, a motion to remand after removal to federal court. *Gully v. First National Bank in Meridian,* 299 U.S. 109, 112 (1936). *See also* Wright, Miller and Cooper; *Federal Practice and Procedure:* Jurisdiction § 3722.

A federal question, in order to support removal jurisdiction, ". . . must be an element and an essential one, of the plaintiff's cause of action." *Gully v. First National Bank in Meridian, supra* at 112. *See also Phillips Petroleum Co. v. Texaco, Inc.,* 415 U.S. 125, 127 (1974). It is not sufficient that the complaint may disclose an anticipated defense on federal grounds, *Skelly Oil Co. v. Phillips Co.,* 339 U.S. 667, 672 (1950), or that ". . . defendant is almost certain to raise a federal defense", *Pan American Petroleum Corp. v. Superior Court, supra* at 663, or that federal cases may be referred to for guidance or interpretation. *Cf. Gully v. First National Bank in Meridian, supra* at 115. *See also Minnesota v. Northern Securities Co.,* 194 U.S. 48, 65 (1904) (dictum).

Respondent California's complaint shows clearly an election to proceed on the basis of California state antitrust law and to eschew any reliance on federal antitrust laws.[5] California invoked jurisdiction of its state court pursuant to California Business and Professions Code sections 16750, 16754, and 16754.5, charged defendants with having violated the California state antitrust laws set forth in California Business and Professions Code section 16720, and sought treble damages for itself and a class composed of its citizens and residents pursuant to California Business and Professions Code section 16750(c). California in the alternative alleged a right of equitable recovery pursuant to California Business and Professions Code sections 16754 and 16754.5, and referenced California Constitution Article V, section 13 in alleging a right to represent its citizens and residents under a state common law *parens patriae* theory.

5. California acknowledges a lone, insignificant, and inadvertent reference in its complaint to the Sherman Act. (Pet. App. F., p. 44)

The Court of Appeals, although it failed to express its reasons, unmistakably was applying established tests to the plain facts set forth above when it stated, "*Here we are squarely faced with claims asserted under California antitrust law . . .*" [emphasis added] (Pet. App. pp. 4-5), and concluded that California's claims ". . . *arise under state law and do not arise under federal law.*" [emphasis added] (Pet. App. A, p. 7). Petitioners, in contrast, do not acknowledge the above facts, nor do they discuss the applicable law. The petition, for that and other reasons, fails to raise any substantial legal controversy.

B. PETITIONERS BELATEDLY RAISE A HYPOTHETICAL AND UNMERITORIOUS PREEMPTION ARGUMENT WHICH, IF ACCEPTED, WOULD GREATLY EXPAND FEDERAL REMOVAL JURISDICTION.

Petitioners for the first time[6] now resort to a preemption argument in an attempt to overcome the inescapable conclusion that California's complaint raises state, not federal, antitrust law claims. Petitioners avoid the term "preemption", but nevertheless assert the "paramountcy" of federal antitrust laws (Pet. p. 19). Petitioners argue that California's antitrust laws in particular are preempted on the basis of a supposed conflict with this Court's ruling in *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977). Petitioners' arguments, respondent submits, are both hypothetical and unmeritorious, and would, if accepted, result in an unwarranted expansion of federal removal jurisdiction.

6. Petitioners expressly conceded in the district court below that California state antitrust laws were not preempted (Defs'. Memo in Oppos. . . . Fed. Quest. Grnds., p. 18), and failed to raise a preemption argument in the Court of Appeals. Petitioners' argument in support of removal in the Court of Appeals was based on *res judicata* cases, in which the facts involved rather than the statutes alleged are determinative. *See, e.g., Williams v. Columbia Gas & Electric Corp.,* 186 F.2d 464, 468 (3rd Cir. 1950) *cert. denied* 341 U.S. 921 (1951). Petitioners in probable recognition that acceptance of their position would have removed practically all existing restrictions on removal jurisdiction have now dropped entirely their argument based on *res judicata* cases.

This Court held long ago that the federal antitrust laws do not preempt state law, even in matters of interstate commerce. *Standard Oil Co. v. Tennessee,* 217 U.S. 413, 422 (1910). Twenty-one (21) states had statutes proscribing combinations in restraint of trade at the time of passage of the Sherman Act. Note, *"The Commerce Clause and State Antitrust Enforcement"*, 61 Colum. L. Rev. 1469, 1469 (1961).[7] The purpose of Congress in passing the Sherman Act was to supplement, not preempt, state antitrust enforcement.

> "This bill . . . has for its . . . object to invoke the aid of the courts of the United States to deal with the combinations . . . when they affect injuriously our foreign and interstate commerce . . . and in this way to supplement the enforcement of the established rules of the common and statute laws by the several states in dealing with combinations that affect injuriously the industrial liberty of the citizens of those states . . .." 21 Cong. Rec. 2457 (1890). (remarks of Sen. Sherman)

Nor do petitioners raise any substantial arguments regarding preemption of California's antitrust laws. Petitioners' argument is that since indirect purchasers generally may not show injury by proof of passing-on, *Illinois Brick, supra,* and direct purchasers may generally recover the whole overcharge, *Hanover Shoe v. United Shoe Machinery Corp.,* 392 U.S. 481, 494 (1968), a problem of double recovery arises when an indirect purchaser brings suit in

7. The so-called California Cartwright Act was passed in 1907. Calif. Stats. 1907, c. 530, p. 984.

California state court because California has enacted a statute which confirms the right of indirect purchasers to sue. Calif. Bus. and Prof. Code § 16750, as amended. Petitioners' argument is both legally and factually hypothetical.[8] It is also without merit.

California courts should be given an opportunity to interpret California's *Illinois Brick* statute before this Court makes any ruling on the basis of a supposed "conflict". Petitioners may argue, for instance, if and when this case is returned to state court that California's *Illinois Brick* statute is not that at all, and that indirect purchasers under California law, as under federal law, are precluded from showing injury by proof of passing on. It is inconceivable in any case that California courts would not take whatever steps necessary to preclude the possibility of double recoveries.[9] Petitioners in reality are seeking removal in order to avoid single, not double, recovery.

No substantial issue of preemption would arise even if petitioners could demonstrate that their conjured threat of double recovery were real rather than speculative. *Illinois Brick* relates to courtroom procedures and to matters of proof, not to standards of behavior. There is no risk here of the imposition by California of different standards of behavior from those imposed under the federal antitrust laws. California's antitrust laws furthermore are in a traditional area of local concern well within the scope of its police powers, especially where they are used, as here, by

8. This Court has long had a policy against deciding hypothetical constitutional questions in "advance of . . . necessity". *Parker v. County of Los Angeles*, 338 U.S. 327, 333 (1949). *Accord: Alabama Federation of Labor v. McAdory*, 325 U.S. 450, 461, 470 (1945).

9. It is clearly the policy of the State of California, at least in regard to *parens patriae* antitrust actions, that there shall be no duplicative recoveries. Calif. Bus. and Prof. Code § 16760.

the State itself to protect the interests of its citizens as consumers. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144, 146 (1949).

Petitioners' entire preemption argument, even if it were ripe for determination and were meritorious, is properly a defense to California's action in state court, not a ground for removal to federal court. *Williams v. First National Bank*, 216 U.S. 582, 594 (1910); *State of Washington v. American League of Professional Baseball Clubs*, 460 F.2d 654, 660 (9th Cir. 1972). The approach taken by petitioners, if accepted, would lead to a substantial and unwarranted expansion of federal removal jurisdiction to cover any case brought in state court in which the defendant might raise a possible preemption argument.

C. PETITIONERS OVERLOOK THE CONTEXT, AND MISINTERPRET THE PURPOSE, OF THE DISCUSSION BY THE COURT OF APPEALS OF ILLINOIS BRICK.

Petitioners complain that the Court of Appeals erroneously confused the question of removal jurisdiction with a question on the merits of whether the complaint states facts sufficient to constitute a cause of action under federal law. The Court may well have confused the two questions, *Bell v. Hood, supra* at 682, but to the extent such is true, it is also beside the point, since the proper test is not whether the facts constitute a cause of action under federal law, but is rather whether California's claims "arise under" state law, and the Court did so find.

Any confusion by the Court, furthermore, is a direct result of petitioners' falacious argument, now abandoned, that removal jurisdiction is determined solely by reference to the facts alleged. The Court of Appeals simply adopted petitioners' position for the sake of argument, respondent submits, and showed how petitioners had become trapped

by their own unfounded argument through an unanticipated change in the law.[10]

II. Petitioners in Effect Ask This Court to Eliminate the Derivative Requirement for Removal Jurisdiction.

It has long been the view of this Court that a federal district court acquires no jurisdiction after removal from state court if the state court itself lacked jurisdiction. *Lambert Run Coal Co. v. Balt. & Ohio R.R. Co.*, 258 U.S. 379, 382 (1922). Since jurisdiction under the Clayton and Sherman Acts is exclusively federal, 15 U.S.C. Sec. 15, an action under those laws may not be brought in state court, and, even if brought, is not properly removable to federal court. *General Investment Co. v. Lakeshore and Michigan Railway Co.*, 260 U.S. 261 (1922); *Caraway v. Ford Motor Co.*, 144 F.Supp. 295, 296 (W.D. Mo. 1956). *See also State of Washington v. American League of Professional Baseball Clubs, supra*, at 658.

Petitioners, having taken a position under which they are forced to ignore established tests for removal, and to argue for the preemption of all state antitrust laws and California's in particular in a manner that would greatly expand removal jurisdiction, now must necessarily also argue for the elimination of the derivative requirement for removal jurisdiction. Petitioners appear reluctant to take this last step, however, and so pretend instead that they did not really ask for total preemption of state law, that they really intended to preserve just enough state law to satisfy the derivative nature of removal jurisdiction. Petitioners' pretension allows them to argue that they seek to contain the doctrine of derivative jurisdiction, rather than to eliminate it or to create an exception. The resort by petitioners to plain sophistry reveals their awareness of the lack of substance in the position they take.

The district court below, which otherwise supported petitioners, rejected petitioners' argument that California's complaint arises under federal, not state, law for one purpose and arises under state, not federal, law for another. The district court instead requested elimination of the derivative jurisdiction doctrine in multidistrict litigation cases. (Pet. App. C, p. 17) Petitioners offer no support for the district court's request, thereby revealing the lack of substance in the Court's position.[11]

The history of this litigation on petitioners' side has been not only their struggle to eliminate the state statutes from California's complaint, but to do so without running afoul of the derivative jurisdiction requirement. Respondent submits that petitioners have presented no substantial legal basis for accomplishing either result.

10. The law in the Ninth Circuit as to the offensive use of passon at the time the petitioners filed their responding brief in the Court of Appeals was opposite to that finally pronounced by this Court in *Illinois Brick. In Re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied* 94 S.Ct. 1419 (1974).

11. The Court of Appeals also considered that the district court's position lacked substance, wherein it stated:

> "Where [as here] the purpose is not to bring the challenged action to trial but to stay it . . . a forthright motion to enjoin state action would focus on the true problem more accurately. . . ." (Pet. App. A, p. 7).

CONCLUSION

Respondent respectfully prays that the petition be denied.

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In the

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1370

CALIFORNIA AND HAWAIIAN SUGAR COMPANY, AMALGAMATED SUGAR COMPANY, AMERICAN CRYSTAL SUGAR COMPANY, AMSTAR CORPORATION, THE GREAT WESTERN SUGAR COMPANY, HOLLY SUGAR CORPORATION, UNION SUGAR DIVISION, CONSOLIDATED FOODS CORPORATION, U AND I INCORPORATED, and CALIFORNIA BEET GROWERS ASSOCIATION, LTD.,

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v.

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Respondents.

Respondent Madelyne Brinker's Brief in Opposition to Petition for a Writ of Certiorari

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Petitioners,

v.

STATE OF CALIFORNIA and MADELYNE BRINKER,

Respondents.

Respondent Madelyne Brinker's Brief in Opposition to Petition for a Writ of Certiorari

QUESTION PRESENTED

In spite of petitioners' attempt to unduly complicate the issues at hand through the injection of immaterial matters, the single question presented can be simply stated:

Was not respondent's lawsuit improvidently removed to the federal district court from the California Superior Court

when respondent's cause of action was totally founded upon California law and not upon federal law, and when the federal law upon which such removal was allegedly based does not provide a basis for the relief that respondent seeks?

STATUTES INVOLVED

As well as the statutes set forth in the Petition at pages 4 - 6, this case also involves Calif. Bus. & Prof. Code § 16760, which provides in pertinent part:

> The Attorney General may bring a civil action in the name of the people of the State of California, as parens patriae on behalf of natural persons residing in the state, in the superior court of any county which has jurisdiction of a defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of this chapter. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury or (B) which is properly allocable to * * * (ii) any business entity.

STATEMENT OF THE CASE

Petitioners' statement of the case, although substantially correct, contains much that is completely irrelevant to the question to be decided, and appears to be an attempt to convince the Court that the question presented is of greater import than appears from an impartial reading of the decision upon which they seek review.

Respondent Brinker filed her complaint in the Superior Court of the State of California on December 16, 1975, alleging unfair trade practices in restraint of trade in violation of section 16600 *et seq.* of the California Business and Professions Code, commonly referred to as the Cartwright Act. The complaint alleged that the defendant sugar companies conspired to fix and stabilize the retail price of refined sugar at an unlawfully high level.

On March 3, 1976, Respondent Brinker noticed a motion to have the suit certified as a class action pursuant to section 382 of the California Code of Civil Procedure, seeking to represent all individuals who during the relevant period purchased refined sugar at retail within the state of California in its original bulk package form, from retailers which sold sugar supplied by one or more of the defendants.

On March 17, 1976, before the motion on class certification could be heard by the California court, defendants removed the action to the United States District Court for the Northern District of California pursuant to 28 U.S.C. § 1441. Although Mrs. Brinker's cause of action was based entirely upon state law, defendants based their removal upon the allegation that Mrs. Brinker's complaint was founded on a claim or right arising under the laws of the United States, specifically the Sherman and Clayton Acts (15 U.S.C. §§ 1, 15).[1]

On March 26, 1976, Respondent Brinker moved the federal district court pursuant to 28 U.S.C. § 1447(c) for an order remanding her cause of action to the California Superior Court on the grounds that the case was removed improvidently and without proper jurisdiction. Specifically, remand was urged on the grounds that Respondent's suit arose under a right created by a statute of the State of California, and *not* under a right created by the laws of the United States.

---

1. Initially, defendants advanced as a further ground that respondent's one count complaint was removable pursuant to 28 U.S.C. § 1441(c), as containing a "separate and independent claim or cause of action" which would have been removable if sued upon alone. This contention was abandoned in the Court of Appeal.

On July 23, 1976, the district court issued its "Order Re: Memorandum Decision on Plaintiffs' Motion to Remand" in which it denied this motion. This ruling was specifically premised upon the finding that respondent's state law complaint presented on its face allegations which would allow a damage recovery under the Sherman Act. Petition, Appendix C, p. 12, n.2.

The Court of Appeals reversed the district court and ordered a remand to the state court, finding that respondent's claim arose under state law and not federal law. Petition, Appendix A, p. 7. As petitioners point out, this finding was in part based upon this Court's opinion in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which held that indirect purchasers such as respondent were not persons injured in their business or property as that term is used in section 4 of the Clayton Act.[2] *Illinois Brick*, however, did not form the entire basis for the opinion of the Court of Appeals, which can only be reversed by doing grave harm to the delicate balance between federal and state legislative powers.

REASONS FOR DENYING THE WRIT

An analysis of the Petition reveals that in order to attack the Court of Appeals decision below, petitioners are forced to ask this Court to both completely disregard age-old principles of federal and state comity, and to enlarge the jurisdiction of the federal courts beyond anything heretofore imagined. The petitioners, in effect, are asking this Court to rule:

> (1) that the removal jurisdiction of the federal courts be expanded to allow removal of state court causes of action, even if they are totally based upon state-created rights, and even if there is no federal right that provides the state court plaintiff with a claim for relief;
> and
> (2) that contrary to all past decisional law, the Sherman Act preempts every state attempt to regulate business and competition to which the broad jurisdiction of the Act might arguably apply.

2. Contrary to petitioners' assertion (Petition, p. 11), this point was argued by respondent's counsel in the Court of Appeals.

The correctness of the Court of Appeals' decision is demonstrated by the lengths to which petitioners are forced to go in asking this Court to review that decision.

I. Respondent's Cause of Action Is Totally Based Upon State Law and Cannot Arise Under Federal Law

Petitioners' entire argument that respondent's cause of action arose out of a federal right or law consists of the assertions that the complaint alleges "a set of facts constituting a violation of the Sherman Act," and that respondent cannot "prevent removal of a case that states a cause of action under a federal statute by seeking solely a state remedy." Petition, pp. 15-16. This not only misstates clearly established law, but it also inconsistent with other arguments that petitioners find themselves forced to make.

It has been well established for over 50 years that even though the operative facts of plaintiff's case provide a choice between federal or state causes of action, plaintiff may choose not to assert a federal right and may rely instead solely on state law. *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913). Questions concerning federal jurisdiction and the ouster of the jurisdiction of state courts are determined by "the particular claims a suitor makes in a state court—on how he casts his action." *Pan Am. Petro. v. Superior Court*, 366 U.S. 656, 662 (1961).

It is therefore immaterial that the facts alleged in Respondent Brinker's complaint *may have supported* a claim under the Sherman Act.[3] "If a plaintiff decides not to involve a federal right, his claim belongs in a state court." *Pan Am. Petro. Corp. v. Superior Court, supra,* 366 U.S. at 663. Only if a right created by federal law is an essential element of plaintiff's cause of action does a suit "arise" under the laws of the United States for purposes of removal. *Phillips Petroleum Company v. Texaco, Inc.,* 415 U.S. 125 (1974); *Gully v. First Nat'l Bank,* 299 U.S. 109 (1936).

Moreover, the rule that petitioners suggest this Court adopt is not only unsupported in law, it would wreak havoc with the dual system of federal and state courts in this country. "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Healy v. Ratta,* 292 U.S. 263, 270 (1934). Petitioners seem to assert that no matter how well-grounded a plaintiff's suit is in state-created law, it is removable as long as some federal statute exists which also happens to offer a cause of action. If this were the law, the jurisdiction of the federal courts over lawsuits based upon a state's common law or statutory rights would be limited only by a defendant's resourcefulness in searching through the myriad of federal statutes until he found one which happened to offer an alternative route to the courthouse. This was not the intent of Congress in passing the removal statutes. *See Shamrock Oil & Gas Corp. v. Sheets,* 313 U.S. 100, 108-109 (1941).

3. As discussed below, petitioners elsewhere admit that no such claim can be supported here. *See* Petition, p. 22.

It is not enough that respondent has alleged facts that would have sustained a claim under some federal law, unmentioned in her complaint. Unless that law is a *necessary and essential prerequisite* to her recovery, there can be no removal. The California Cartwright Act provides the only law that is necessary to respondent's cause of action, and this Court's analysis need go no further in finding that her claim does not arise under the Sherman Act.

Remarkably, however, even this drastic interference with the rights of the states to legislate in the interests of their citizens is not enough to support petitioners' position, and they are compelled to *further* assert that a complaint cast pursuant to a state law can be removed to federal court, not only when no federal right is essential to the plaintiff's claim, but even if federal law *does not even provide a cause of action* under the facts alleged.

Petitioners are forced into this position by this Court's decision in *Illinois Brick,* which held that indirect purchasers of price-fixed items were not "persons injured in their business or property" who could recover damages under the Sherman Act. Therefore, *Illinois Brick* implies not only that there is no federal right essential to respondent's cause of action, but moreover, that respondent's complaint does not even give rise to a federal right at all. There is simply no federal right upon which respondent's state law complaint could be based.

Petitioners argue that *Illinois Brick* only held that there is no relief under the Sherman Act, and not that there is no subject-matter jurisdiction, and that therefore, *Illinois Brick* is irrelevant to questions corncerning removal. Petition, pp. 22-23.

The issue on removal is indeed subject-matter jurisdiction. *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S.

336 (1976). It is not surprising, however, that petitioners never even bother to point out that the standard *for determining* this subject-matter jurisdiction on removal is that a right created by federal law must be an *essential element* of the plaintiff's cause of action. *Gully v. First National Bank, supra.* Because of this standard, the *Illinois Brick* determination that respondent cannot recover under federal law *is* a determination that her complaint can be based on no federal right, essential or otherwise, and that there was no proper removal jurisdiction over this case. Petitioners' argument simply begs the question.

If petitioners' position were to be seriously considered, it would mean a devastating intrusion of the federal courts into state matters. A defendant would not only be allowed to recast a state court complaint in terms of any federal statute which also provided relief, and thus obtain a removal of an entirely state-controlled matter into federal court; he would also be able to do so even if there were no federal statute that provided relief, and thus obtain a dismissal of the action. If this were the law, there would be no limit to federal removal jurisdiction.

II. The Federal Antitrust Laws Do Not Preempt Parallel Efforts By the States to Curb Anticompetitive Conduct

Faced with the extreme nature of the position to which they are forced to retreat, petitioners come at last to the final solution to their dilemma: that, in effect, all state antitrust laws are preempted by federal law in matters of interstate commerce.[4]

4. This provides an explanation for the petitioners' frequent citations to cases arising under the Labor Management Relations Act of 1947, which *does* preempt state efforts at regulation of labor matters. *See, e.g.,* cases cited at pages 16-17. These cases are irrelevant to the present issue.

Initially, preemption of a state statute by federal law is not a ground for removal, but is instead a constitutional defense to be asserted in the state court. *State of Washington v. American League of Professional Baseball Clubs,* 460 F.2d 654, 660 (9th Cir. 1972). The existence of an overriding federal statute "'. . . would only demonstrate that the suit could not be maintained at all, and not that the cause of action arose under the Constitution or laws of the United States.' [Citation omitted]" *Williams v. First National Bank,* 216 U.S. 589, 594 (1910).

In any case, the California antitrust laws are not preempted by federal legislation. Despite the district court's statement in its Order Re: Memorandum Decision that "[t]he enactment of state legislation identical or comparable to the Sherman Act and other federal Acts has been of relatively recent origin" (Petition, Appendix C., p. 17), this is simply not the case. The California Cartwright Act was passed in 1907, only a short time after the Sherman Act. Calif. Stats. 1907, c. 530, p. 984. Indeed, at the time of the passage of the Sherman Act, 21 states already had statutes proscribing "combinations in restraint of trade." *See* Mosk, State Antitrust Enforcement, 21 A.B.A.J. 358 (1962); Note, The Commerce Clause and State Antitrust Enforcement, 61 Colum. L. Rev. 1469 (1961).

The intent of Congress in passing the Sherman Act was clearly *not* to preempt parallel state efforts to regulate trade. In the words of Senator Sherman (21 Cong. Rec. 2457 (1890)):

> This bill . . . has for its . . . object to invoke the aid of the courts of the United States to deal with the combinations . . . when they affect injuriously our foreign and interstate commerce . . . and in this way to supplement the enforcement of the established rules of the common and statute laws by the several states in deal-

> ing with combinations that affect injuriously the industrial liberty of the citizens of those states. It is to arm the federal courts within the limit of their constitutional power that they may cooperate with the state courts in checking, curbing and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States . . . .

The Supreme Court long ago established that Congress has not preempted state antitrust laws, even in the area of interstate commerce. *Standard Oil Co. v. Tennessee,* 217 U.S. 413 (1910). This doctrine has been consistently followed by other courts. *See, e.g., Mathews Conveyor Co. v. Palmer-Bee,* 135 F.2d 73, 82 (6th Cir. 1943); *R.E. Spriggs Co. v. Adolph Coors Co.,* 37 Cal.App.3d 653, 112 Cal.Rptr. 585 (1974); *State of Texas v. S.E. Tex. Chap. Nat. Elec. Con. Assn.,* 358 S.W.2d 711 (Tex. Cir. App. 1962), *cert. denied,* 372 U.S. 969 (1963); *State of Wisconsin v. Allied Chemical & Dye Corp.,* 9 Wis.2d 290, 101 N.W.2d 133 (1960); *Commonwealth of Massachusetts v. McHugh,* 93 N.E.2d 751 (1950); *Leader Theatre Corp. v. Randforce Amusement Corp.,* 58 N.Y.S.2d 304 (1945).

Although faced with this case law, petitioners still argue that "the Sherman Act is the paramount law of the land and that conflicting state laws cannot be applied to interstate transactions." Petition, p. 12, n. 6. The conflict claimed is with "the policy of the federal antitrust laws as expressed in *Illinois Brick*" that the Sherman Act be interpreted to avoid duplicative recoveries. Petition, p. 19.

This policy is *not* in conflict with California's Cartwright Act. As noted in both the opinion of the Court of Appeals (Petition, Appendix B, p. 9), and in the Petition itself (at p. 19, n. 13), California has recently passed section 16760

of the California Business and Professions Code, expressing an interest to avoid duplicative recoveries in suits by indirect purchasers, at least in *parens patriae* cases.

As petitioners point out, whether this is applicable in private suits is a matter "that will presumably be decided by the courts of California." Petition, p. 19, n. 13. Petitioners are asking this court to invalidate a state statute before the state courts have had a chance to interpret this statute so as to prevent a conflict. Since such a determination will be binding on this court (*Quong Ham Wah Co. v. Indust. Acc. Comm.,* 255 U.S. 445 (1921)), the issue of any such conflict is not yet ripe for decision. Furthermore, that is no reason to think that the California courts will countenance any such duplicative recovery.

It is important to note that contrary to petitioner's assertions (Petition, pp. 21-22), this is *not* a case which raises the spector of corporate confusion concerning what conduct is legal and what conduct is illegal. The only *possible* conflict merely concerns which parties may sue—price-fixing is clearly illegal under both state and federal law.[5]

This Court has made it clear on numerous occasions that in the field of trade regulation ". . . as in other areas of coincident federal and state regulation, the 'teaching of this court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.'" *Exxon Corp. v. Governor of Maryland,* ....U.S....., 98 S.Ct. 2207, 2216 (1978). In the words of this Court, "[t]his sort of hypothetical conflict is not sufficient to warrant preemption." *Exxon Corp., supra,* 98 S.Ct. at 2216-17.

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5. Even if this were a case involving a state statute which required a different standard of competitive conduct than did federal law, this Court has just recently reconfirmed the right of a state to do so, even if the state law makes illegal what federal law condones. *Exxon Corp. v. Governor of Maryland,* ..... U.S. ....., 98 S.Ct. 2207, 2217-18 (1978).

III. The Fact That This Case Involves Multidistrict Litigation Has No Bearing on the Jurisdiction of the Federal Courts.

Petitioners seem to imply throughout their petition that because this case involves multidistrict litigation pursuant to 28 U.S.C. § 1407, different jurisdictional rules should apply than would otherwise. This was one basis for the district court's refusal to remand. *See* Petition, Appendix C, pp. 16-17. The history of the adoption of § 1407 shows clearly that the statute was not intended to expand in any way the jurisdiction of the federal courts.

The purpose of Congress in enacting § 1407 was described in the House Report on Senate Bill 159 (reproduced in 2 U.S. Code & Cong. & Admin. News, 90th Cong. 2nd Sess., at 1898) (emphasis added):

> The bill adds a new section 1407 to title 28, United States Code, to provide judicial machinery *to transfer, for coordinated or consolidated pretrial proceedings, civil actions,* having one or more common questions of fact, *pending in different judicial districts.*

In the words of Judge William H. Becker of the Panel:

> The purpose of section 1407 as shown independently by its clear language, corroborated by the legislative history, including the reports of the Congressional Committees and of the Judicial Conference, and by testimony before Congress of its authors, makes it clear that *its remedial aim is to eliminate the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts in multidistrict related civil actions. (In Re Plumbing Fixture Cases,* 298 F.Supp. 484, 490-92, 495 (Jud. Pan. on Mul. Dist. Lit., 1968)) (Emphasis added, footnote deleted.)

Section 1407 was intended, therefore, only as a procedure for effecting more efficient pretrial proceedings in related

cases which are *already pending* in the federal district courts. It was not intended to alter the basic jurisdiction of the federal courts.

The Report of the Coordinating Committee on Multiple Litigation Recommending New Section 1407 (reproduced as an Appendix to *In Re Plumbing Fixture Cases, supra*) clearly shows that the intent was *not to alter* the rules pertaining to the jurisdiction of the federal courts:

> The Co-Ordinating Committee considered whether the necessary procedural changes could be accomplished under existing rule-making authority. Study led to the conclusion that venue, historically a matter of legislative concern, would be affected by any appropriate solution of the problems. An earlier draft of a similar proposed statute would have provided the necessary statutory authority but would have required substantial implementation by the panel under specifically delegated flexible rule-making authority. After considering the comments received on an earlier draft, *the Committee has concluded that its objectives can be achieved by the more limited and specific statute now proposed which authorizes only implementing rules not inconsistent with any Act of Congress or the Federal Rules of Civil Procedure. (In Re Plumbing Fixture Cases, supra,* 298 F.Supp. at 498.) (Emphasis added.)

In sum, it is evident from the legislative history of section 1407, that the section was intended to do no more than to provide a procedure for the consolidation of federal cases for pretrial purposes. To say that this could affect the jurisdiction of the federal courts is to put the proverbial cart before the horse. If the federal courts have no jurisdiction over a case from the onset, then a rule concerning only the consolidation of federal cases for pretrial purposes certainly cannot change this fact. The Court of Ap-

peals for the Sixth Circuit has indeed so ruled. *Bancohio Corp. v. Fox,* 516 F.2d 29, 32 (6th Cir. 1975).

This Court has repeatedly cautioned that the removal jurisdiction of the federal courts must be strictly construed to carry out the Congressional intent to restrict such jurisdiction. *See, e.g., Shamrock Oil & Gas Corporation v. Sheets,* 313 U.S. 100, 109-10 (1941). As this Court has explained:

> The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties. To permit a federal trial court to enter a judgment in a case removed without right from a state court where the federal court could not have original jurisdiction over the suit . . . would . . . work a wrongful extension of federal jurisdiction and give district courts power the Congress had denied them. *American Fire & Casualty Co. v. Finn,* 341 U.S. 6, 17-18 (1951).

CONCLUSION

For the above reasons, the Petition should be denied.

Dated, San Francisco, California,

April 2, 1979.

Respectfully submitted,

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